LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON, PETITIONER,

vs.

ELEANOR MUELBERGER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1950.

CERTIORARI GRANTED NOVEMBER 6, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON, PETITIONER,

vs.

ELEANOR MUELBERGER

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notice of appeal to Appellate Division	2	2
Order and decree appealed from	4	2
Petition	6	3
Exhibit—Last will and testament of E. Bruce Johnson	11	6
Citation	13	8
Answer	15	9
Minutes of hearing of January 12, 1948	16	9
Appearances	16	9
Colloquy	16	9
Offers in evidence	18	11
Testimony of George A. Wagner	19	12
Thomas Burroughs	21	13
Colloquy	30	21
Motion to dismiss and denial thereof	32	22
Testimony of Genevieve Johnson	33	23
Colloquy	34	24
Minutes of hearing of May 12, 1948	37	25
Appearances	37	25
Offer in evidence	37	25
Testimony of Eric Muelberger, Jr.	39	27
Mildred Altes	51	37
Offers in evidence	53	38
Opinion by Leone D. Howell, Surrogate	55	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPT. 13, 1950.

	Original	Print
Proceedings in the Appellate Division of the Supreme Court of New York	56	40
Stipulation as to printing of exhibits	56	40
Stipulation waiving certification	60	42
Notice of appeal to the Court of Appeals	61	43
Order of affirmance of Appellate Division, appealed from	63	44
Opinion of the Appellate Division	64	44
Stipulation waiving certification	65	44
Clerk's certificate (omitted in printing)	66	
Opinion of the Court of Appeals	68	45
Remittitur	74	51
Order extending time to file petition for certiorari	76	53
Order allowing certiorari	77	53

[fol. 1]

IN THE COURT OF APPEALS OF NEW YORK

In the Matter of the Application of ELEANOR MUELBERGER for a determination of the right of Genevieve Johnson, under Section 18 of the Decedent's Estate Law to elect to take an intestate share against the provisions of the Last Will and Testament of E. BRUCE JOHNSON, Deceased.

ELEANOR MUELBERGER, Petitioner-Appellant,

GENEVIEVE JOHNSON, Respondent-Respondent.

STATEMENT UNDER RULE 234

This proceeding was commenced by the filing of the petition of Eleanor Muelberger, as daughter and sole legatee under the last will and testament of E. Bruce Johnson, the decedent, in the Office of the Surrogate's Court of the County of Nassau, on January 30, 1947, praying for a determination of the right of Genevieve Johnson to elect to take an intestate share against the provisions of the last will and testament of said E. Bruce Johnson, deceased, and her status as widow of said decendent.

The citation herein was issued on the 30th day of January, 1947, and was returnable in the Surrogate's Court on the 19th day of February, 1947. It was served upon Genevieve [fol. 2] Johnson, the respondent, on the 4th day of February, 1947, who served and filed her answer to the petition herein on the 19th day of February, 1947.

The original parties to this proceeding were: Eleanor Muelberger, petitioner, and Genevieve Johnson, respondent. There has been no change of parties or attorneys from the commencement of this proceeding, except that LeRoy G. Edwards, Esq., of 1530 Franklin Avenue, Mineola, Long Island, New York, has been substituted as attorney for Eleanor Muelberger, petitioner appellant, in place and stead of Saul Hammer, Esq., of 152 West 42nd Street, New York, New York.

IN THE SURROGATE'S COURT, NASSAU COUNTY

In the Matter of the Application of ELEANOR MUELBERGER for a determination of the right of Genevieve Johnson, under Section 18 of the Decedent's Estate Law to elect to take an intestate share against the provisions of the Last Will and Testament of E. BRUCE JOHNSON, Deceased.

NOTICE OF APPEAL TO APPELLATE DIVISION

SIR:

Please take notice, that Eleanor Muelberger, daughter and sole legatee of E. Bruce Johnson, Decedent, the peti-
[fol. 3] tioner in the above entitled proceeding herein, hereby appeals on the law and on the facts to the Appellate Division of the Supreme Court, 2nd Department, from the order and decree made in the above entitled proceeding by Leone D. Howell, Surrogate of the County of Nassau and entered in his office on the 28th day of July, 1948, determining that Genevieve T. Johnson is the surviving spouse of the decedent and that the notice of election filed by her in that capacity is valid and effective and from each and every part of said order and decree.

Dated: New York, N. Y., August 20, 1948.

Yours, etc., Saul Hammer, Attorney for Eleanor Muelberger, Petitioner, Office & P. O. Address, 152 West 42nd Street, New York City.

To: Thomas Berry, Attorney for Genevieve Johnson, Respondent, 215 Montague Street, Brooklyn 2, New York. Surrogate of the County of Nassau, Mineola, New York.

[fol. 4] IN THE SURROGATE'S COURT

Present: Hon. Leone D. Howell, Surrogate.

[Title omitted]

ORDER AND DECREE APPEALED FROM—July 28, 1948

Eleanor Muelberger, daughter and sole legatee of E. Bruce Johnson, Decedent, having duly petitioned this Court by petition duly verified the 29th day of January, 1947, pray-

ing for a determination of the right of Genevieve Johnson, under Section 18 of the Decedent's Estate Law, to elect to take an intestate share against the provisions of the Last Will and Testament of E. Bruce Johnson, Decedent, and a citation having been thereupon issued pursuant to Section 145A of the Surrogate's Court Act, directed to Genevieve Johnson, citing her to show cause before the Surro- [fol. 5] gate's Court of the County of Mineola on the 19th day of February, 1947, why the prayer of the petition should not be granted and said respondent, Genevieve Johnson having appeared by Thomas Berry, Esq., her attorney, and having duly filed an answer to the petition herein, and the matter having duly come on to be heard by the Surrogate on the 12th day of January, 1948 and the 12th day of May, 1948, and the said petitioner, Eleanor Muelberger, having appeared by Saul Hammer, Esq., her attorney, and LeRoy G. Edwards, Esq., of counsel and the said Genevieve Johnson having appeared by Thomas Berry, Esq., her attorney, and Munley & Meade, Esqs., of counsel, and the Surrogate having heard the allegations and proofs of the parties and having duly filed its opinion and decision, dated the 7th day of July, 1948;

Now on motion of Thomas Berry, Esq., attorney for the respondent, Genevieve T. Johnson, it is,

Ordered, adjudged and decreed that Genevieve T. Johnson is the surviving spouse of the decedent, E. Bruce Johnson and that the notice of election, dated the 17th day of November, filed by her in that capacity in the office of the Clerk of this Court, on the 27th day of December, 1946, is valid and effective.

Leone D. Howell, Surrogate.

[fol. 6] In the Surrogate Court, Nassau County

Petition—January 29, 1947

To the Surrogate's Court of the County of Nassau:

The petition of Eleanor Muelberger, residing at Navesink, New Jersey, respectfully shows to this court:

1. That your petitioner is the daughter of E. Bruce Johnson, the decedent, and is the sole legatee named in said decedent's last will and testament.

2. That said decedent, E. Bruce Johnson, at the time of his death resided at 19 Flower Lane, New Hyde Park Nassau County, State of New York and died on June 25th, 1945, in the City, County and State of New York.

3. That said decedent died leaving a last will and testament dated April 21st, 1943, which was duly admitted to probate on the 27th day of August, 1945, and Letters Testamentary thereon were duly issued to Eric Muelberger, Jr., the executor named in said Last Will and Testament, by the Surrogate's Court of the County of Nassau, and said executor has duly qualified thereunder and has since been and still is acting as such executor. A copy of said last will and testament is annexed to this petition and made a part hereof.

[fol. 7] 4. That by the terms of said last will and testament, the decedent bequeathed and devised his entire estate to your petitioner.

5. That heretofore and on or about the 27th day of December 1945, one Genevieve T. Johnson, claiming to be the surviving spouse of said decedent, caused to be served upon Eric Muelberger, Jr., as executor under the last will and testament of said decedent, a notice dated November 17th, 1945, as provided for under Section 18 of the Decedent's Estate Law, electing to take a share of said decedent as intestacy.

6. That thereafter a copy of said Notice of Election was filed in the Office of the Clerk of said Surrogate's Court of Nassau County.

7. That your petitioner is desirous, pursuant to Section 145A of the Surrogate's Court Act, to have this court determine the right, relationship and status of Genevieve T. Johnson, the validity and effect of the said election filed by her as aforesaid and to make its determination with respect thereof.

8. That your petitioner is the daughter of said decedent and the sole legatee under his said will and testament, as aforesaid, and is therefore a person interested in this proceeding.

9. That the notice of election above referred to is invalid and of no effect in that the said Genevieve T. Johnson is

not the surviving spouse of the decedent, and has no right of election, as granted by Section 18 of the Decedent Estate Law.

[fol. 8] 10. That said Genevieve T. Johnson claims to be the wife of the decedent and his surviving spouse by virtue of a purported marriage ceremony performed on the 19th day of February, 1944, at Great Neck, in the County of Nassau, State of New York.

11. That said purported marriage by the decedent to said Genevieve T. Johnson is absolutely void and of no effect under and pursuant to Section 6 of the Domestic Relations Law for the reason that at the time decedent contracted the same with said Genevieve T. Johnson said decedent had a wife by a former marriage, to wit, Madoline Johnson, who was living at said time.

12. That the decedent was married to Madoline Johnson, nee Ham, at the City of San Francisco, State of California, on the 15th day of April 1939, and that said marriage has never been legally and validly annulled or dissolved.

13. That on or about the 29th day of July, 1942, said Madoline Johnson instituted an action for an absolute divorce against the decedent in the Court of Record, Escombia County, Pensacola, State of Florida, and there and therein on the 17th day of August, 1942, obtained a decree of divorce against decedent.

14. That at the time of the institution of said action for divorce by Madoline Johnson against the decedent and her procurement of said decree of divorce against him, and for sometime prior thereto, said Madoline Johnson and the [fol. 9] decedent were domiciled in and residents of the State of New York.

15. That said Madoline Johnson was never domiciled in the State of Florida, and the residence in the State of Florida alleged by her in her said action for divorce was a sham and fraud and for the sole purpose of taking advantage of the divorce laws of the State of Florida; that she did not reside in the State of Florida for two years prior to the institution of the aforesaid action, as alleged in her Bill of Complaint therein, nor did she reside in the State of Florida for the period required by the statutes of the State of Florida for the maintenance of a divorce action, to wit,

ninety days, and she never acquired a bona fide domicile and residence in the State of Florida.

16. That by reason thereof the decree of divorce procured by said Madoline Johnson against the decedent as aforesaid was null and void and of no effect and did not dissolve or annul the marriage between herself and the decedent.

17. That the only persons interested in the estate and in these proceedings are: Genevieve T. Johnson, alleged surviving spouse, 19 Flower Lane, New Hyde Park, N. Y.; Eric Muelberger, Jr., executor, Navesink, New Jersey and that all of the foregoing are of full age and sound mind.

[fol. 10] Wherefor your petitioner prays that a citation to show cause issue herein to all the persons interested in these proceedings to show cause why the Surrogate should not make a determination as to the right, relationship and status of Genevieve T. Johnson, and the validity and effect of the notice of election filed by her, and why a decree should not be entered adjudging and decreeing that Genevieve T. Johnson is not the surviving spouse of the decedent and her said notice of election is invalid and of no effect and for such other and further relief as to this Court may seem just and proper.

Dated: January 29, 1947.

Eleanor Muelberger.

(Verified by Eleanor Muelberger on January 29, 1947.)

[fol. 11] EXHIBIT TO PETITION

LAST WILL AND TESTAMENT, ANNEXED TO FOREGOING PETITION

I, E. Bruce Johnson, residing at Fifth Place, Garden City, Nassau County, New York, being of sound mind and disposing memory, and realizing the uncertainty of life and certainty of death, do hereby make, public and declare this, the following, as and for my Last Will and Testament, hereby revoking in toto any and all former Wills and Codicils heretofore executed by me.

First:

I hereby direct that my funeral expenses and all my just debts be paid as soon after my demise as the same may be practicable.

Second:

All the rest, residue and remainder of my estate and property of which I may die seized or possessed, or to which at my death I may be entitled, or over which I have the power of disposition, whether real, personal or mixed, of whatsoever description the same may be, and wheresoever situate, I give, devise and bequeath unto my beloved daughter, Eleanor Isabelle Muelberger, to be hers, absolutely, in fee and forever.

Third:

I hereby nominate, constitute and appoint my daughter's husband, Eric Muelberger, Jr., to be the Executor of this, [fol. 12] my Last Will and Testament, and I hereby direct that he not be required to give any bond or security as such, any law of any State to the contrary notwithstanding.

In witness whereof, I have hereunto set my hand and seal this 21st day of April, 1943.

E. Bruce Johnson (L. S.)

Signed, sealed, published and declared as and for his Last Will and Testament, by E. Bruce Johnson, the above named testator, in the presence of us and each of us, who in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses to said Will on the 21st day of April, 1943.

Names	Addresses
G. Mead,	53-112 63rd Street, Maspeth, N. Y.
C. Butler,	105 Parth Rd., Scarsdale, N. Y.
C. Foster,	71 East 77th Street, New York City.

[fol. 13] IN THE SURROGATES COURT

CITATION—January 30, 1947

THE PEOPLE OF THE STATE OF NEW YORK

To: GENEVIEVE T. JOHNSON, Greetings:

Whereas, Eleanor Muleberger who resides at Navesink, New Jersey, has lately applied to the Surrogate's Court of our County of Nassau, to have a determination, pursuant to Section 145A of the Surrogate's Court Act, of the right, relationship and status of Genevieve T. Johnson, and the validity and effect of her notice of election pursuant to Section 18 of the Decedent Estate Law, dated the 17th of November 1945, served upon Eric Muelberger, Jr., the executor herein, on the 27th day of December, 1946 and thereafter filed in the Office of the Clerk of this court, and for a decree adjudging and decreeing that Genevieve T. Johnson is not the surviving spouse of the decedent and that her said notice of election is invalid and of no effect.

Therefore, you, and each of you, are cited to show cause before the Surrogate's Court of our County of Nassau, at the Surrogate's Court, County Court House, at Mineola, in the County of Nassau, on the 19th of February 1947, at 10 o'clock in the forenoon of that day why the Surrogate should not make a determination as to the right, relationship and status of Genevieve T. Johnson, and the validity and effect of the notice of election served and filed by her, as aforesaid, and why a decree should not be entered, adjudging and decreeing that Genevieve T. Johnson is not the surviving [fol. 14] spouse of the decedent and her said notice of election is invalid and of no effect.

In testimony whereof, we have caused the seal of the Surrogate's Court of our said County of Nassau to be hereunto affixed.

Witness, Hon. Leone D. Howell, Surrogate of our said County of Nassau, at the Surrogate's Office, at Mineola, in the said County the 30th day of January, one thousand nine hundred and forty-seven.

Everett C. Furman, Clerk of the Surrogate's Court.
(Seal)

[fol. 15] IN SURROGATE'S COURT, NASSAU COUNTY

ANSWER

GENEVIEVE T. JOHNSON, for an answer to the petition herein:

Denies the allegations contained in said petition in the paragraphs or subdivisions thereof which are marked or numbered "9", "11" and "16" and so much of paragraph or subdivision "12" as alleges "that said marriage has never been legally and validly annulled or dissolved."

Denies that she has any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs or subdivisions of said petition which are marked or numbered "14" and "15".

Wherefore, respondent prays that the said petition be dismissed and for such other and further relief as to this Court may seem just and proper.

Thomas Berry, Attorney for Respondent, Office & P. O. Address, No. 215 Montague Street, Brooklyn 2, New York.

(Verified by Genevieve T. Johnson on February 19, 1947.)

[fol. 16] IN THE SURROGATE'S COURT, NASSAU COUNTY

Minutes of Hearing, January 12, 1948

Mineola, N. Y., January 12, 1948.

Before: Hon. Leone D. Howell, Surrogate.

APPEARANCES:

Saul Hammer, Esq., By LeRoy G. Edwards, Esq., of Counsell for the Petitioner.

Thomas Berry, Esq., By John H. Munley, Esq., of Counsel, for the Respondent.

COLLOQUY

Mr. Edwards: May I give your Honor a few words on this? This is a proceeding under Section 145a of the Surrogate's Court Act to test the validity of an election filed

under Section 18 of the Decedent Estate Law. The circumstances, briefly, are these: E. Bruce Johnson died a resident of this county on June 25, 1945. He left a will dated April 21, 1943 which was probated on August 27, 1945, in which will he left all to his daughter.

We expect to show that the decedent in 1939 married one Madoline Ham in the west. They came east to Nassau County and lived in Garden City. Subsequently this wife [fol. 17] went to Florida and obtained a divorce from Mr. Johnson which we claim is invalid because she did not reside there long enough. That we expect to prove. Before she went to Florida for this divorce she left Mr. Johnson's home in Garden City and went to live in West Hempstead with a man by the name of Burroughs, whom she subsequently married after she returned from Florida with the so-called Florida divorce. After some months she left Mr. Burroughs and he heard nothing from her until some months later or some time later, when he was served with papers issued in the State of Montana, for a divorce against him. In the meantime Mr. Johnson had married Genevieve Johnson, who claims to be his widow and who is the one who has filed this notice of election. We claim she could not be his wife inasmuch as Mr. Johnson had not been properly divorced and that Madoline Johnson was still his wife. At least, he could not have this Genevieve Johnson as his legal and lawful wife. That is the basis of our claim.

The Court: You represent the Estate, too?

Mr. Edwards: I am really representing the petitioner. I am associated with Mr. Hammer.

The Court: Who is the petitioner?

Mr. Edwards: The daughter, Mrs. Muelberger, who takes under the will.

The Court: Who represents the Estate?

Mr. Edwards: Mr. Hammer.

Mr. Munley: May it appear, to supplement Mr. Edwards' explanation, that in the divorce proceedings in Florida the decedent, Bruce Johnson, was a party defendant and appeared in the action and filed an answer. He did not defend.

[fol. 18] Mr. Edwards: We claim that no matter if he did put in an appearance, the Florida Court did not have jurisdiction and that would not give the Court jurisdiction. It is true he filed an answer and did not defend.

The Court: What does the record of the divorce in Florida show?

Mr. Edwards: We have a certified copy.

The Court: What jurisdiction had been acquired? There must have been certain allegations.

Mr. Edwards: In her petition she said she had been a resident of the State of Florida for upwards of two years. I am going to ask whether the Court will take judicial notice of a requirement of the Florida law that there must be a residence of at least ninety days before the Court can obtain jurisdiction.

The Court: That is one of the rules. I must consider very carefully the jurisdiction of the Florida Court.

Mr. Munley: It has been held that where courts have required jurisdiction and there have been appearances of both parties that the proceeding cannot be contested. That is our contention.

The Court: What is the latest word of the Supreme Court of the United States with reference to these divorces? Have they reached any conclusion?

Mr. Edwards: Not that I know of.

The Court: Who will take the laboring oar?

OFFERS IN EVIDENCE

Mr. Edwards: I suppose I have to. I offer in evidence certified copy of a marriage certificate showing the marriage of Edward Bruce Johnson to Madoline Ham on the 15th of April, 1939. This is in California.

[fol. 19] (The paper referred to was received in evidence and marked Petitioner's Exhibit 1.)

Mr. Edwards: I would like to have marked for identification a certificate of marriage which identifies this party Johnson. It was found among her papers after she had left Mr. Burroughs and subsequently married.

(The paper referred to was marked Petitioner's Exhibit 2 for identification.)

Mr. Edwards: I offer in evidence the record of the Court of Escambia County, Florida, in an action of Madoline Johnson against E. Bruce Johnson, certified copy of the record which shows the petition, notice or summons to Mr. Johnson, receipt of an application for final decree, a copy of the

answer of E. Bruce Johnson, and the decree with the various certificates which show that a divorce was granted to Madoline Johnson from E. Bruce Johnson.

(The papers referred to were received in evidence and marked Petitioner's Exhibit 3.)

GEORGE A. WAGNER, 19 Greenridge Avenue, Garden City, New York, called as a witness by the Petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Edwards:

Q. Mr. Wagner, are you the postmaster of the post office at Garden City, Nassau County, New York?
A. I am.

[fol. 20] Q. How long have you been postmaster?
A. Twelve years.

Q. At my request or the request of my representative did you examine your records to see whether in the year 1942 there was an application filed by Madoline Johnson of 12 Fifth Place, Garden City, for a change of address?
A. I did not personally examine the record. I had my secretary examine the record.

Mr. Munley: I object to that as not within his knowledge.
The Court: The postmaster would not have knowledge ordinarily. I will take it.
Mr. Munley: Exception.

By Mr. Edwards:

Q. Was the record given to you, Mr. Wagner?
A. It was.

Mr. Munley: I object to this line of questioning as not binding on my client, Genevieve T. Johnson.
The Court: We haven't gone far enough yet.

By Mr. Edwards:

Q. Will you tell us what the record indicated, Mr. Wagner?

A. The record shows there was a change of address of Madoline Johnson, 12 Fifth Place, to 9 North Poplar Street, West Hempstead, on April 13, 1942.

Mr. Edwards: That is all.

Mr. Munley: I move to strike out the testimony as not binding.

[fol. 21] Mr. Edwards: If it is objected to on the ground that the original record was not produced, may we have it produced later?

The Court: He is not objecting to that.

Mr. Munley: I am objecting upon the competency of the evidence, its relation to my client, Genevieve Johnson.

The Court: I will take it.

THOMAS BURROUGHS, 20 North Poplar Street, West Hempstead, New York, called as a witness by the Petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Edwards:

Q. Did you formerly live at 9 North Poplar Street?

A. Yes, I did. It is the same address. They just changed the numbers.

Q. You live in the same house?

A. Yes.

Q. The address has been changed?

A. Yes.

Q. Do you know Madoline Johnson, Mr. Burroughs?

A. Yes, I did.

Q. Will you tell us, please, when you first met the lady?

A. I believe it was around February or March, 1942.

Q. Where did you meet her?

A. At Perry's Cafe.

Q. Where is that?

A. In Lakeview.

Q. In Nassau County?

A. Yes.

Q. That was in February or March, 1942?

A. That is right.

Q. You never knew the lady before that time at Perry's?

A. No, I did not.

[fol. 22] Q. From that date on did you see her more or less frequently for some months?

Mr. Munley: I object to this line of examination on the fround that it is not binding on Genevieve T. Johnson.

The Court: Objection overruled now. I haven't got the feel of this case yet.

Mr. Munley: I can't see any particular connection with the issues involved.

The Court: Overruled.

Mr. Munley: Exception.

By Mr. Edwards:

Q. Did you see her then more or less frequently for some months thereafter?

A. Yes, I did.

Q. Do you know where Madoline Johnson was living at the time you met her in February or March?

A. Yes.

Q. Will you give us the address?

A. No. 12 Fifth Place, Garden City.

Q. Do you know whether or not at that time she was living with Mr. E. Bruce Johnson?

A. She was living in the same house with him.

Q. That is what I mean. That was his residence?

A. That is right.

Q. Then for some time after February or March, 1947, will you tell us, please, whether to your own knowledge Mrs. Johnson left the residence of Mr. E. Bruce Johnson at 12 Fifth Place, Garden City?

Mr. Munly: Will you state the year?

By Mr. Edwards:

Q. I meant 1942. It was in 1942 that you met Mrs. Johnson first?

A. That is right.

[fol. 23] Q. To put the question this way: did she later leave the residence of Mr. Johnson and come to live in the same house with you?

A. Yes.

Q. When was that, Mr. Burroughs, as near as you can tell us?

A. It was around May, I believe, 1942.

Q. Between February or March, 1942, and May, 1942, had you seen Mrs. Johnson with more or less frequency?

A. Yes.

Q. Some time in May you told us Mrs. Johnson left 12 Fifth Place, Garden City, the home of Mr. E. Bruce Johnson, and came to stay in the same house you lived in?

A. Yes.

Q. That was then what?

A. 9 Poplar Street.

Q. West Hempstead?

A. West Hempstead.

Q. Do you know what rooms or what accommodations were at that address?

A. Her accommodations?

Q. Yes.

A. She lived upstairs and I lived downstairs with my daughter.

Q. You were a widower?

A. That is correct.

Q. You had some conversation, did you not, with Mrs. Johnson about a Florida divorce?

A. That is right.

Mr. Munley: I object to that.

The Court: I will allow it.

Mr. Munley: Exception.

By Mr. Edwards:

Q. In June, 1942, as a result of a conversation between you and Mrs. Johnson did she leave the house at 9 North Poplar Street, West Hempstead?

A. Yes.

Q. Do you know where she went?

A. Pensacola, Florida.

[fol. 24] Q. Did she take anybody with her?

A. Yes, my daughter.

Q. What was your daughter's name?

A. Jean Mary Burroughs.

Q. At that time she was about how old? How old was Jean?

A. Around ten.

Q. At that time was Jean attending a certain school in Hempstead?

A. She was around eight.

Q. Do you wish to change the age from ten to eight?

A. Yes.

Q. In May or June, 1942, what school, if any, was Jean attending?

A. Sacred Heart Seminary School in Hempstead on Fulton Avenue.

Q. Do you remember about when, what date, Mrs. Johnson and Jean left West Hempstead to go to Florida?

A. It was the early part of June, 1942.

Q. Is there any way, Mr. Burroughs, that you could fix a little more definitely the date that Mrs. Johnson and Jean left West Hempstead?

A. It would be quite hard to give you an exact date.

Q. May I ask you this question: she left the school before the session was over, did she not?

A. Yes, I think she left a week before.

Q. She left, Jean, West Hempstead with Mrs. Johnson within a day or two after she ceased going to the Academy of the Sacred Heart, is that correct?

A. Yes.

Q. That was early June, 1942?

A. That is right.

Q. Later, in either July or August,—June, July or August, did you go to Florida to see Mrs. Johnson and Jean?

A. Yes.

Q. Can you tell us about when it was you went to see them?

A. In July, 1942.

Q. Can you give us any nearer than that the date you [fol. 25] left West Hempstead, that you yourself left West Hempstead?

9. Around July 16th or 17th.

Q. Do you recall how you went to Florida?

A. By bus.

Q. Did you visit Mrs. Johnson and Jean?

A. Yes.

Q. Where were they living?

A. In Pensacola, Florida.

Q. What sort of accommodations did they have?

A. A cabin.

Q. In one of those socalled motor courts?

A. No, this was a sort of private cabin, a private estate, like.

Q. Did you stay there and visit them for some days?

A. Yes. I stayed almost two weeks.

Q. Nearly two weeks?

A. Yes.

Q. Then did you return?

A. Yes.

Q. To West Hempstead?

A. That is right.

Q. Can you tell us about the date you left Florida in July, 1942, or the date that you got back?

A. I can't tell you the exact date I got back. It was some time in August, the early part of August, 1942.

Q. Mrs. Johnson and Jean did not return with you?

A. No.

Q. They did return later, however, did they?

A. Yes, they returned later.

Q. Do you know about what time Mrs. Johnson and Jean returned from Florida?

A. The latter part of August or early part of September.

Q. Are you sure about when they returned, about the date?

A. I am sure it was in between that time.

Q. It was a short time after you returned?

A. That is right.

[fol. 26] Q. After Mrs. Johnson and Jean returned from Florida, then a short time after that did you, Mrs. Johnson, and Jean take a trip anywhere?

A. Yes.

Q. Where did you go?

A. To Elkton, Maryland. We got married there.

Q. To get married?

A. Yes.

Q. You and Mrs. Johnson?

A. Yes.

Q. Were you and Mrs. Johnson in fact married at Elkton, Maryland?

A. Yes, I have the certificate.

Mr. Munley: Are you offering this marriage certificate?

Mr. Edwards: Yes.

Mr. Munley: For what purpose?

Mr. Edwards: To show that the marriage actually took place, a marriage ceremony was performed in Elkton, Maryland.

Mr. Munley: If it is offered for that particular purpose I have no objection to it. As to any other phase of it I object to it as not binding on my client.

(The paper referred to was received in evidence and marked Petitioner's Exhibit 4.)

By Mr. Edwards:

Q. Mr. Burroughs, after the wedding ceremony on the 30th of August, 1942 in Maryland between you and Mrs. Johnson, did you and your wife return to West Hempstead?

A. That is right.

Q. With the little girl?

A. That is right.

Q. Did you live, you and your wife, at West Hempstead for some time after August 30, 1942?

A. Yes.

[fol. 27] Q. Can you tell us about how long the lady lived with you there at West Hempstead as your wife?

Mr. Munley: I object to this line of testimony on the ground that it is incompetent, irrelevant, immaterial, and it has no connection with the respondent in this case.

The Court: I will allow it.

Mr. Munley: Exception.

A. How long?

By Mr. Edwards?

Q. Yes.

A. Close on to two years.

Q. What happened after that so far as the lady was concerned?

A. I went to the hospital and she cleaned me out and left town.

Q. While you were away she went away, too?

A. That is right.

Q. Took certain property of yours, and so forth?

A. Yes.

Q. From that date that she left have you ever seen her?

A. No, I have not.

Q. Did you hear from her, directly or indirectly?

A. Indirectly from her attorneys?

Q. You mean you had some letters from her attorneys?

A. No, a summons for divorce.

Q. Were certain papers served upon you by the Sheriff of Nassau County?

A. Yes.

Q. You recall that?

A. Yes.

Mr. Munley: I don't like to be continually objecting to this line of testimony, but I do think we are going far afield now. I again repeat my objection.

The Court: I do not see it. If the allegations that Mr. [fol. 28] Edwards has presented have any bearing on this case then this testimony is competent testimony.

Mr. Munley: This is all subsequent to the action for divorce upon which he has offered evidence, that in Florida. It is on that basis that I object.

The Court: I will take it.

Mr. Munley: Exception.

By Mr. Edwards?

Q. You were served with certain papers, were you?

A. Yes, I was.

Q. By the Sheriff of Nassau County?

A. Yes.

Q. Do you remember what state those paper were from?

A. Great Falls, Montana.

Mr. Edwards: I offer in evidence exemplified copy of proceedings in the State of Montana, District Court, Eighth Judicial District, in and for the County of Cascade, a complaint in a divorce action between Madoline Burroughs and Thomas Burroughs, which was verified the 11th of May, 1945: the order of publication of summons, proof of mailing, affidavit of service, and the decree that the plaintiff is entitled to a decree, absolute decree of divorce from the defendant, Thomas Burroughs.

Mr. Munlay: Objection is made to the offering of such papers concerning matter in the courts of Montana on the ground it is not binding on the respondent in this proceeding.

The Court: I will allow it.

Mr. Munley: Exception.

(The papers referred to were received in evidence and marked Petitioner's Exhibit 5.)

[fol. 29] By Mr. Edwards:

Q. Mr. Burroughs, when the lady left you she left certain of her papers behind, did she?

A. Yes.

Q. Did you find that paper which I now hand you which is marked Petitioner's Exhibit 2 for identification in this proceeding?

A. Yes.

Q. Did you find that among the papers which she left?

A. That is right.

Mr. Edwards: I offer it in evidence.

Mr. Munley: No objection.

(The paper heretofore marked Petitioner's Exhibit 2 for identification was received in evidence and marked Petitioner's Exhibit 2 in evidence.)

By Mr. Edwards?

Q. Mr. Burroughs, did she leave a bank book or a check book on the Garden City Bank?

A. Yes.

Q. Have you that book here?

A. Yes.

Q. A pass book. Have you the check book?

A. I have the stubs and part of the other.

Q. Have you a check drawn to a lawyer in Florida?

A. Named Forsythe Caro, yes.

Q. Would you tell us, please, whether you were familiar with the signature of Madoline Johnson?

A. Yes.

Q. Her writing?

A. Yes.

Q. Will you tell us whether that is her writing or not?

A. Yes, that is her handwriting.

Mr. Edwards: I am offering the check drawn on the Garden City Bank & Trust Company by Madoline Johnson [fol. 30] August 15, 1942, in the amount of $50, and the check book which has various entries through June, 1942, and also her deposit book which Mr. Burroughs has testified he found in her papers. I offer these for the purpose of showing she was in this neighborhood, County of Nassau in Garden City, and considered this, or we argue that, as her residence at that time.

Mr. Munley: I object to that as not binding on the respondent.

The Court: I would not think that would establish a residence. She might have drawn these checks while she was in Florida. She could have a bank account up here.

Mr. Edwards: I will withdraw the offer. I offer them to show she had a bank account in Garden City and also the party to whom the check was drawn was apparently the attorney who represented her in this divorce action.

The Court: I will allow it as showing she had an account in Garden City.

Mr. Munley: I object, the same objection, as not binding on the respondent.

Mr. Edwards: I offer them as one exhibit.

(The check, deposit book and check stub book were received in evidence and marked Petitioner's Exhibit 6.)

Mr. Edwards: That is all.

Mr. Munley: No cross examination.

COLLOQUY

Mr. Edwards: If the Court please, perhaps I cannot make this as an offer, but we subpoenaed the record of the Semi-[fol. 31] nary in Hempstead where the young lady attended, which showed certain dates which we would like to establish. The sister in charge was good enough to entrust us with the records but has written a letter in June, 1946, to Mr. Hammer stating that their religious belief prevents their coming to court. If there is an objection I don't know exactly how that can be taken up. We would like to have the date in the record, simply as to what the record shows.

The Court: I don't want to quarrel with the sisters but I cannot take much stock in that. Does anybody question the records?

Mr. Munley: I do not question the records. It is not binding on us.

The Court: I will take it as a record showing that.

Mr. Munley: There is a letter I do object to, of course.

Mr. Edwards: I won't read the letter. I will simply let you state what the cards show.

The Court: When did she leave?

Mr. Edwards: The last day was June 5, 1942 and it says she was transferred to public school on September 14, 1942.

Mr. Munley: No objection to the reading, but I object to the offer on the ground that it is not binding upon our client.

The Court: I will take it.

Mr. Edwards: I assume you will concede that Mr. Johnson and your client, Genevieve Johnson, were married on February 19, 1944, at Great Neck, Nassau County, New York?

Mr. Berry: Yes.

[fol. 32] Mr. Edwards: That is our case with the exception of whether you will take judicial notice of what the Florida law is or whether we will have to produce the statute.

The Court: I will take a look at it first.

Mr. Edwards: We are not barred from offering something further if you wish it?

The Court: That is right.

Mr. Munley: May I have a short recess? I will reserve motions until after recess.

The Court: Are you going to put in some testimony?

Mr. Munley: Just some short testimony.

(A recess was taken.)

MOTION TO DISMISS AND DENIAL THEREOF

Mr. Munley: The respondent moves for a dismissal of the petition upon the grounds that the applicant has failed to show facts sustaining the petition; and upon the further ground that it is a collateral attack upon the divorce obtained in a foreign jurisdiction upon which both principals to the divorce proceeding acted.

The Court: I am not going to entertain your motion for a dismissal on the ground that the evidence is not pertinent. You cannot throw off a divorce granted in another state like that. It can't be done. I have had two or three here with reference to Florida divorces particularly. I think one of them went to the Court of Appeals. The question of divorce as among the various states is pretty well in distress, I think. If a fraud was committed on that court that is one [fol. 33] thing. Whether this state should declare the divorce invalid because of certain circumstances is another phase of the matter. It is not a matter I can throw off lightly and I am going to deny your motion at this time.

I want to investigate this a bit before I give any decision. Have you some testimony you would like to put in?

Mr. Munley: Yes. Exception to your ruling.

Genevieve Johnson, the Respondent, 19 Flower Lane, New Hyde Park, New York, being first duly sworn, testified as follows:

Direct examination.

By Mr. Munley:

Q. Mrs. Johnson, did you in the year 1944 marry the decedent, E. Bruce Johnson?

A. I did.

Q. Where were you married?

A. Great Neck, Nassau County.

Q. Thereafter where did you live?

A. 19 Flower Lane, New Hyde Park.

Q. Did the decedent, E. Bruce Johnson, cohabit with you at that address?

A. He did.

Q. Did he live with you at that address until the date of his death?

A. He did.

Q. When did he die?

A. June 29, 1945.

Mr. Berry: It is in the papers as the 25th.

By Mr. Munley:

Q. Did you live there at that address prior to March?

A. I did.

Q. That was your home, was it not?

A. It was.

[fol. 34] Q. Mr. Johnson moved in with you?

A. He did.

Q. Who lived with you from the time of your marriage up to the date of Mr. Johnson's death other than Mr. Johnson?

A. My daughter and my son.

Q. They all lived at that address?

A. They all lived together at that address.

Q. Did anyone related to your husband live there?
A. No.

Mr. Munley: That is all.
Mr. Edwards: No questions.

COLLOQUY

The Court: Mr. Edwards, there is no question about the fact that these two people entered into a marriage?
Mr. Edwards: I think they were married by my opponent.
Mr. Munley: I performed the marriage.
The Court: There is no question here that Mrs. Johnson and Mr. Johnson were married?
Mr. Edwards: Correct.
The Court: She believes at this time she is his widow?
Mr. Edwards: That is right.
The Court: Mr. Edwards questions that because he says the marriage could not have been legal when performed because of a prior marriage, and he has introduced testimony of this so-called prior marriage.
Mr. Edwards: That is the question, sir.
The Court: That is all there is to it. It now becomes a legal proposition, it would seem to me, as to whether [fol. 35] or not that divorce was legal under the testimony given here. Mr. Edwards now relies upon his testimony that the divorce in Florida was not and could not have been legal because of residence and whatnot, and therefore Mr. Johnson was not divorced and could not have married this lady.
Mr. Edwards: That is it, sir.
The Court: According to your theory of this case, Mr. Edwards, the first hurdle we have to take is whether or not there was a legal divorce in Florida which permitted this lady to marry Mr. Johnson at a later date.
Mr. Edwards: That is right.
Mr. Munley: There enters into it now another marriage to Burroughs.
The Court: You get down to the nub of this: whether a valid divorce was gained by the first wife from Mr. Johnson in Florida at the time stated. If there was, then this lady had a perfect right to marry Mr. Johnson at a later date and all the divorces between this first Mrs. Johnson and Mr. Burroughs has nothing to do with this. What she did afterwards has no bearing on the case. What she did

afterwards hinges upon her right under the first divorce. This divorce on the facts Mr. Edwards alleges cannot be thrown over lightly. It requires some study as to what effect this Court must give to a divorce obtained in Florida on papers that appear to be in order. That you had better brief to me. We won't worry about the intervening facts. The testimony of Mr. Burroughs is, of course, competent to [fol. 36] show that she was up here and the daughter went to Florida with her, and how long she stayed. If this Court has the right to attack the findings of the Court in Florida then that becomes pertinent. If that was a valid divorce obtained in Florida then this lady is in the clear.

Mr. Edwards: May we have two weeks for briefs?

The Court: Yes. I will be glad to give you such time as you want. If you want to reserve any argument until after you have filed your memoranda you may.

Mr. Edwards: May we have that right if we desire?

The Court: Yes. Memoranda to be submitted in four weeks.

[fol. 37] SURROGATE'S COURT, NASSAU COUNTY

Minutes of Hearing, May 12, 1948

Mineola, N. Y., May 12, 1948.

Before: Hon. Leone D. Howell, Surrogate.

APPEARANCES:

Saul Hammer, Esq., By LeRoy G. Edwards, Esq., of Counsel, for the Petitioner.

Thomas Berry, Esq., By John H. Munley, Esq., of Counsel, for the Respondent.

OFFER IN EVIDENCE

Mr. Munley: Since the last hearing in this matter, which was held on January 12, 1948, we have been conducting an investigation in order to locate Madoline Johnson, who was the second wife of the decedent and who obtained a divorce from the decedent in Florida in 1942. That is the divorce which the Petitioner, Eleanor Muelberger, claimed was obtained by fraud. We had some information to the effect that she was within the jurisdiction, but we have been unable to locate her. In the meantime, in the course of

our investigation we located and discovered that the said Madoline Johnson in November, 1941, had instituted an [fol. 38] action for divorce in the State of Florida against the decedent E. Bruce Johnson. That action was discontinued. The divorce that was obtained was instituted some time in the summer of 1942 and the proceedings in connection with that divorce are in evidence.

I would like to offer in evidence today the exemplified copy of the proceedings of the first divorce action instituted in November, which indicates at that time that Madoline Johnson, the second wife, declared herself at that time to be a resident of Florida and also in that proceeding the defendant, the decedent, appeared in the action and did not contest the jurisdiction. In other words, we have two divorce proceedings: one instituted in November, 1941, and discontinued in February, 1942, and another one instituted in July, 1942, but subsequently went to a decree.

The Court: You are simply offering it to prove her assertion that she was a resident of Florida?

Mr. Munley: Yes.

The Court: That is the sole purpose of your offering it?

Mr. Munley: Yes. I am offering it for all purposes.

The Court: Is there any objection?

Mr. Edwards: Yes, I object to it as incompetent, irrelevant and immaterial.

The Court: I will take it and hold decision.

Mr. Edwards: It is nothing more than a piece of paper. The action was discontinued. It has no legal effect.

[fol. 39] The Court: I will take it and dispose of it as it unfolds.

Mr. Edwards: Exception.

(The paper referred to was received in evidence and marked Objectant's Exhibit A of this date.)

Mr. Munley: That is all I have to offer.

Mr. Edwards: I wish to introduce evidence to show the residence of the parties in this state and this county.

ERIC MUELBERGER, JR., Navesink, New Jersey, called as a witness by the Petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Edwards:

Q. Mr. Muelberger, were you acquainted with E. Bruce Johnson in his lifetime?

A. I was.

Q. When did you first meet Mr. E. Bruce Johnson?

A. I guess it is fifteen years ago or twenty.

Q. You knew him more or less intimately from the time you met him until the time of his death?

A. That is right.

Q. Were you associated with Mr. E. Bruce Johnson in business?

A. I was, for many years.

Q. During what period of years?

A. I should say for the last fifteen years, roughly.

Q. Did you know Mrs. Madoline Johnson?

A. Yes.

Q. You knew her personally?

A. That is right.

Q. When did you first meet Mrs. Madoline Johnson?

A. That was in December, 1939.

[fol. 40] Q. Where did you meet Mrs. Madoline Johnson at that time?

A. I met her in New York City at the Hotel Lincoln.

Q. Mr. Muelberger, you knew Mr. Johnson and Mrs. Madoline Johnson had been married previously in the west?

A. That is right. I think it was about nine or ten months before that.

Q. Then Mr. Johnson had been a representative in the west of the business in which he was interested and in which you were also engaged?

A. That is correct.

Q. In December, 1939, or thereabouts, he came east and took a certain position with the company in the east?

A. That is correct.

Q. It was on that occasion that you met Mrs. Madoline Johnson?

A. That is right.

Q. You testified a moment ago that you met Mrs. Madoline Johnson at the Hotel Lincoln in New York?

A. That is right.

Q. Will you tell us whether or not of your own knowledge Mr. E. Bruce Johnson and Mrs. Madoline Johnson lived for some time at the Hotel Lincoln in New York?

A. Not for a very long period at the Hotel Lincoln; a matter of a few months or a few weeks, until January, 1940.

Q. You used to see both Mr. and Mrs. Johnson during the time they lived there?

A. Yes.

Q. Do you know where Mr. Johnson moved to when he left the Hotel Lincoln?

A. Yes, he moved to Austin Place, Kew Gardens.

Q. Was that a house or an apartment?

A. A furnished apartment.

Q. Did you call on Mr. Johnson there?

A. Oh, yes, many times.

[fol. 41] Q. On those occasions did you see Mrs. Madoline Johnson?

A. Oh, yes.

Q. Do you know how long Mr. and Mrs. Johnson lived at Austin Place in Kew Gardens?

A. That was just for a comparatively short period. They moved from Austin Place, Kew Gardens, to Cambridge Avenue in Garden City in the spring of 1940.

Q. In the spring of 1940?

A. Yes.

Q. To Cambridge Avenue, Garden City?

A. Yes.

Q. Did you visit Mr. and Mrs. Johnson at Cambridge Avenue, Garden City?

A. Frequently.

Q. As a visitor in their home?

A. That is right.

Q. On those occasions you saw both Mr. and Mrs. Johnson?

A. That is correct.

Q. Do you know about how long the Johnsons lived at Cambridge Avenue, Garden City?

A. I think it was about a year. Their lease was for about a year. I remember that.

Mr. Munley: I object to that, any reference to a lease, and ask that it be stricken out.

The Court: Strike out the lease part.

The Witness: They lived there for a year to my best recollection.

By Mr. Edwards:

Q. I show you this paper, Mr. Muelberger, and ask you if you will look at the signatures at the bottom and tell me if you recognize any or all of those signatures.

A. Yes, I recognize Mr. Johnson's signature and Mrs. Johnson's signature.

[fol. 42] Q. Madoline Johnson?

A. That is right.

Q. You were acquainted, were you, with Mr. Johnson's signature and Madoline Johnson's signature?

A. Oh, yes.

Mr. Edwards: I offer in evidence paper purporting to be a lease entered into the 9th of February, 1940.

Mr. Munley: I object to the reading of it into the record.

The Court: I will allow it if the signatures are on there.

Mr. Edwards: Between Realty Associates Securities Corporation, a New York Corporation.

Mr. Munley: May I take exception now before the reading?

The Court: It is not necessary to read it.

(The paper referred to was received in evidence and marked Petitioner's Exhibit 1 of this date.)

By Mr. Edwards:

Q. Mr. Muelberger, you are a son-in-law of Mr. E. Bruce Johnson?

A. That is correct.

Q. When did you marry the daughter of Mr. Johnson?

A. In 1933.

Q. You had known him before?

A. For a number of years before that.

Q. You know of your own knowledge about the time Mr. and Mrs. Johnson resided at Cambridge Place, Garden City?

A. Yes. I will have to do a little recollection here. They moved to Kew Gardens in the early part of 1940. Then they lived at 59 Cambridge Place for about a year and [fol. 43] then they moved to 12 Fifth Place, Garden City, the following spring.

Q. That was in 1941?
A. That is correct.
Q. That is in Garden City in this county?
A. Yes.
Q. Did you visit Mr. and Mrs. Johnson at 12 Fifth Place, Garden City?
A. Yes.
Q. On many occasions or rare occasions?
A. Frequently.
Q. Tell us about it.
A. On an average of once every week or two we would visit back and forth; they to our house and we to theirs.
Q. You mean Mr. E. Bruce Johnson and Madoline Johnson visited you and your wife in your home?
A. That is correct.
Q. During the year 1941?
A. That is right.
Q. I show you this paper, Mr. Muelberger, and ask you if you recognize any of the signatures on that paper?
A. Yes, I recognize Mr. Johnson's signature.

Mr. Edwards: I offer in evidence a paper purporting to be an agreement between Henry and Jessie May Learmonth, 12 Fifth Place, Garden City, New York, and E. Bruce Johnson, residing at 59 Cambridge Avenue, Garden City, New York, in which the landlord lets to Johnson premises unfurnished situate at 12 Fifth Place, Garden City, Nassau County, New York. The lease was entered into on the 8th of February, 1941.

Mr. Munley: The same objection.

The Court: The same ruling.

(The paper referred to was received in evidence and marked Petitioner's Exhibit 2 of this date.)

[fol. 44] By Mr. Edwards:

Q. Mr. Muelberger, I think you have already testified that you visited Mr. and Mrs. Johnson at the premises 12 Fifth Place, Garden City?
A. That is right.
Q. Do you know during what period of time?
A. From the time early in 1941 for I guess it was a year.
Q. About a year?
A. Well, possibly longer.

Q. At any time during the year 1941 when you visited Mr. Johnson at 12 Fifth Place, Garden City, was Mrs. Johnson away or there on all occasions?

A. She was there on all occasions until late in the year of 1941. She was away for a short period.

Q. Did she come back?

A. Yes, they were reconciled early in the following year.

Q. In 1942?

A. Yes.

Mr. Munley: I object to that.

The Court: As to the reconciled?

Mr. Munley: Yes.

By Mr. Edwards:

Q. She came back?

A. She came back and we took up just as we were before.

Mr. Munley: I ask that the reconciliation be stricken out.

Mr. Edwards: No objections.

By Mr. Edwards:

Q. After she came back you and your wife continued to visit them at times?

A. Yes, the same as formerly.

[fol. 45] Q. Do you remember when Mr. Johnson moved from 12 Fifth Place?

A. Well, I think it was about 1942. That is my recollection.

Q. Some time during the year?

A. Yes.

Q. In the latter part of Mr. Johnson's residence at 12 Fifth Place did you continue to go there?

A. Oh, yes.

Q. Did you see Mrs. Johnson?

A. Yes.

Q. Up to what period in 1942 did you see Mrs. Johnson at 12 Fifth Place, Garden City?

A. Well, I think it was some time in the spring.

Q. Could you fix the month?

A. I would say roughly April or thereabouts.

Q. Did you visit at Mr. Johnson's home after April, 1942?

A. Oh, yes.

Q. Did you see Mrs. Johnson then?

A. No. After that I didn't see her.

Q. Did you ever see her after the month of April, 1942?

A. I haven't seen her since.

Q. You testified, Mr. Muelberger, that you were well acquainted with Mrs. Madoline Johnson's writing and signature?

A. Oh, yes.

Q. I show you this paper and ask you whose signature that is at the bottom?

A. That is Madoline Johnson's signature.

Mr. Edwards: I offer this letter in evidence signed by Madoline Johnson, Pensacola, Florida, and addressed to Dear Bruce. There is no date on it.

Mr. Munley: I object to this. There is no date on it.

The Court: It may show something. I will take it.

Mr. Munley: I object on the ground that it is immaterial and not binding on my client.

[fol. 46] The Court: I can't tell until I know what it is.

(The paper referred to was received in evidence and marked Petitioner's Exhibit 3 of this date.)

Mr. Edwards: That is all.

Cross examination.

By Mr. Munley:

Q. Mr. Muelberger, you are the husband of Eleanor Muelberger, the petitioner in this proceeding?

A. That is correct.

Q. Do you live with your wife?

A. I do.

Q. Where do you live?

A. Navesink, New Jersey.

Q. How long have you lived in Navesink, New Jersey?

A. It will be three years in September.

Q. Where did you live prior to that?

A. Elmhurst, New York.

Q. You know the nature of this proceeding, do you not?

A. Yes, I think so.

Q. You know that this petition was brought by your wife to exclude Genevieve Johnson from participating in the estate of E. Bruce Johnson?

A. I do.

Q. You know that if your wife is successful in this proceeding that Mrs. Johnson will not participate in the estate?

A. Yes, I do.

Q. You know also that if Mrs. Genevieve Johnson is excluded from participating in the estate, your wife will receive the entire estate?

A. I do.

Q. You know that if Genevieve Johnson is successful in this proceeding she will receive part of the estate that your wife may receive if she were successful?

A. I understand that.

[fol. 47] Q. When, Mr. Muelberger, did you first hear about this proceeding?

A. Well, let me see, I think it must be a couple of years ago.

Q. Can you tell us approximately when?

A. I would say it was about this time two years ago, to my best recollection.

Q. Have you talked with anybody concerning your testimony in this matter?

A. No.

Q. This is the first time you have discussed it, is it not?

A. Yes.

Q. So that Mr. Edwards or Mr. Hammer did not know what you were going to testify to until you got on the stand?

A. Well, I believe they are acquainted with all the facts of the case as well as I am.

Q. I didn't ask you that. Will you answer my question, please?

A. We may have discussed some of the factors of the case in this connection. I think probably we did.

Q. Now you say you did discuss this with someone?

A. With my attorney.

Q. Do you desire to change your testimony?

A. Yes, I will say I discussed it with my attorney.

Q. Did you discuss it with anybody other than your attorney?

A. No—with my wife, of course.

Q. When you said you didn't discuss it you were wrong?

A. I thought you were talking about outsiders.

Q. Were you wrong?

A. I was wrong.

Mr. Edwards: I object to the question. He said he thought he meant outsiders.

The Witness: I didn't know he meant counsel or my wife.

Mr. Munley: I ask that it be stricken out.

The Court: Strike it out. Go ahead.

[fol. 48] By Mr. Munley:

Q. For many years you knew the decedent?

A. Yes.

Q. What was his name?

A. E. Bruce Johnson.

Q. Isn't it a fact that he always signed his name E. Bruce Johnson?

A. To my recollection, yes. Sometimes Edward Bruce Johnson.

Q. What was his name?

A. Edward Bruce Johnson. He generally signed it E. Bruce Johnson.

Q. Sometimes he signed it Edward Bruce Johnson?

A. He has on occasion. I think that was his habit early in life to sign Edward Bruce Johnson.

Q. Now you say you recognize the signature on Petitioner's Exhibit 1. Will you examine that, Mr. Muelberger, please?

A. Yes, I recognize it.

Q. Of course you know that is Edward B. Johnson?

A. That is right.

Q. You say that is the signature of the decedent?

A. I do.

Q. That Petitioner's Exhibit 1 is a lease between Edward B. Johnson and Madoline Johnson and Realty Associates Securities Corporation for premises 59 Cambridge Avenue, Garden City?

A. Yes.

Q. That lease expired on March 14, 1941?

A. I don't know. I haven't read the lease.

Q. That lease was signed by Edward B. Johnson who you say is the decedent, and Madoline Johnson who was the decedent's wife at that time?

A. That is right.

Q. You remember, you say, they lived at that address?

A. Yes.

[fol. 49] Q. How often would you visit there?

A. About an average of two or three times a month. We would visit them or they would visit us.

Q. You did that for the entire period of the leasehold?

A. I don't know what the period of the leasehold is.

Q. From the 15th of March until the 14th of March, 1941.

A. Yes, my recollection is we did.

Q. What type of residence was that?

A. It was a concrete house, frame and concrete two-story house.

Q. How many rooms?

A. I will have to reconstruct it now. I think there was a living room, dining room and kitchen downstairs, and two or three bedrooms and bath upstairs.

Q. On the 8th of February, 1941 the decedent in his name alone took a lease for premises at 12 Fifth Place, Garden City?

A. Yes.

Q. That period commenced on March 15, 1941. That lease did not contain the name of Madoline Johnson, did it?

A. I don't know. I haven't seen it.

Q. I show it to you.

A. No, it does not.

Q. The prior lease for the other premises, 59 Cambridge Avenue, was with both Mr. and Mrs. Johnson?

A. That is right.

Q. When did you say you last saw Madoline Johnson?

A. In the spring of 1942.

Q. There was a time in 1941 when you say Mrs. Johnson was not present at her husband's home in Garden City?

A. That is right.

Q. Before coming to New York isn't it a fact that Mr. Johnson traveled extensively throughout the United States?

A. Not so widespread. He was on the west coast. His [fol. 50] business was on the west coast? He did some traveling up and down the west coast and occasionally came back to New York.

Q. When you say you last saw Madoline Johnson in the spring of 1942 can you be more specific as to the date?

A. I would have to be pretty general. I don't know the exact date, but I believe it was in April, as close as I can place it.

Q. Did you have any knowledge of the divorce proceeding instituted by Madoline Johnson in November, 1941?

A. No, I don't think I did as a divorce proceeding. Mr. Johnson simply told me she had left at that time. Subsequently she returned.

Q. Do you know how long she was away in 1941?

A. Well, it was a matter of weeks. I can place it pretty well. I think she left some time before Thanksgiving and returned in the early part of the following year. I remember it was before Thanksgiving because Bruce, my wife and I spent the holiday together.

Q. At that time she was away?

A. That is right.

Q. Have you seen or heard of Madoline Johnson since the spring of 1942?

A. No.

Q. You, of course, know Genevieve Johnson?

A. Yes.

Q. You visited Mr. Johnson at his home with Genevieve Johnson?

A. Yes.

Q. At that time they lived as man and wife?

A. Yes.

Q. How often did you go there?

[fol. 51] A. About the same schedule, two or three times a month, I would say, and they came to see us.

Q. You or your wife never stayed with Mr. Johnson?

A. Lived with him?

Q. Yes.

A. When we were out west we lived together. That was a number of years ago.

Q. How long ago was that?

A. From 1934 to 1938 I believe we shared the same house in San Francisco.

Q. Since that time you have not resided with him?

A. No.

Q. He has not contributed to your support, has he, at any time?

A. No.

Q. Or that of your wife?

A. No, he has not.

Mr. Munley: That is all.

Mr. Edwards: That is all.

MILDRED ALTES, 679 Grandview Avenue, Brooklyn, New York, called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Edwards:

Q. Miss Altes, did you know Mr. E. Bruce Johnson in his lifetime?

A. Yes, sir, I did.

Q. When did you first meet Mr. Johnson?

A. In the latter part of 1939.

Q. Were you employed by the same company that Mr. Johnson was employed by?

A. Yes, sir.

Q. What is the name of that concern?

A. General Register Corporation.

[fol. 52] Q. Their office is where?

A. It is now at 3620-33rd Street, Long Island City.

Q. In the latter part of 1939 and early part of 1940 Mr. Johnson came from the west and then had his headquarters at the same place of business that you have?

A. That is right, in New York City.

Q. You acted from that time on up to the time of his death as Mr. Johnson's secretary?

A. That is right.

Q. As such secretary you handled his personal letters and mail?

A. That is right.

Q. You were familiar with his handwriting?

A. Yes, sir.

Q. After Mr. Johnson's death did you find certain papers by him in his own handwriting among his effects?

A. Yes.

Q. I show you two telegrams, Miss Altes, and ask you if you found these telegrams among Mr. Johnson's effects after his death?

A. Yes, sir.

Q. Do you have any recollection of ever having seen those telegrams before his death?

A. Yes, I have.

Q. Were they delivered to his place of business?

A. Yes, they were delivered by Western Union messenger.

Q. Who received them?

A. I don't exactly remember who signed for them, but they were given to me and I opened them.

Q. You opened both of them?

A. Yes.

Q. And gave them to Mr. Johnson?

A. That is right.

[fol. 53] Q. You found them among his papers after his death?

A. That is right.

Mr. Edwards: I offer them in evidence.

Mr. Munley: May I ask for what purpose they are offered?

Mr. Edwards: To show the date of Mrs. Johnson's return to her home in Garden City.

Mr. Munley: I object to them on the ground they are not binding on my client.

The Court: You both tried to find out when she went away and when she came back. If this throws any light on it I will take them.

(The telegrams referred to will be received in evidence and marked Petitioner's Exhibits 4 and 5 of this date.)

Mr. Edwards: That is all.

Mr. Munley: No cross examination.

OFFERS IN EVIDENCE

Mr. Edwards: I offer in evidence certified copy of application for operator's license made by Madoline Johnson under date of January 4, 1940, which gives her address as 8267 Austin Street, Kew Gardens, New York.

Mr. Munley: I object to it as not binding.

The Court: I will take it.

(The paper referred to was received in evidence and marked Petitioner's Exhibit 6 of this date.)

Mr. Edwards: I offer in evidence application for operator's renewal application signed by Madoline Burroughs [fol. 54] which gives her address as 9 North Poplar Street, West Hempstead in 1943.

Mr. Munley: I object to that as incompetent, irrelevant and immaterial.

The Court: I will take it.

(The paper referred to was received in evidence and marked Petitioner's Exhibit 7 of this date.)

Mr. Edwards: I ask leave to substitute exemplified copy for photostatic copy.

Mr. Munley: I did not object on that score.

The Court: Have you anything more?

Mr. Munley: No.

(June 9th for submission of memoranda.)

[fol. 55] SURROGATE'S COURT, NASSAU COUNTY

OPINION BY LEONE D. HOWELL, SURROGATE—July 7, 1948

This is a proceeding brought by a daughter of decedent to determine the validity of a right of election filed by Genevieve T. Johnson to take under section 18 of Decedent Estate Law.

The petitioner alleges that the marriage of Genevieve T. Johnson was void on the ground that a decree of absolute divorce granted to Madoline Johnson on August 17, 1942 against decedent in the Court of Record, Escombia County, Pensacola, Florida, was null and void. This raises the question of the faith and credit to be given by this Court to the Florida divorce.

In the Florida court, the decedent appeared by attorney and interposed an answer denying the wrongful acts but not questioning the allegations as to residence in Florida. The record discloses that testimony was taken by the Florida court and the divorce granted Madoline Johnson. Both parties had full opportunity to contest the jurisdictional issues in that court and the decree is not subject to attack on the ground that petitioner was not domiciled in Florida.

Since the decree is valid and final in the State of Florida, it is not subject to collateral attack in the courts of this state.

This Court therefore determines that Genevieve T. Johnson is the surviving spouse of the decedent and the notice of election filed by her in that capacity is valid and effective.

Submit decree on notice.

Leone D. Howell, Surrogate.

[fol. 56] SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

STIPULATION AS TO PRINTING OF EXHIBITS—October 27, 1948

[Title omitted]

SUBJECT TO THE APPROVAL OF THIS COURT

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the following numbered and described exhibits need not be printed, photostated or photographed in the printed Record on Appeal but that the originals may be handed up by either [fol. 57] party so desiring upon the argument or the submission of the appeal herein, with the same force and effect as if incorporated in the printed record on appeal;

Petitioner-Apellant's Exhibits

#1

1/12/48. Certified copy of application for marriage license and of certificate of marriage of Edward Bruce Johnson and Madoline Ham on the 15th day of April, 1939, in the City of San Francisco, State of California.

#2

1/12/48. Original certificate of marriage of Edward Bruce Johnson and Madoline Ham on the 15th day of April, 1939 in the City of San Francisco, State of California.

#3

1/12/48. Exemplified copy of decree of divorce entered in the case of Madoline Johnson vs. E. Bruce Johnson in the Court of Record of Escambia County, Florida, on August 17, 1942, and of the original papers of record and on file in the Office of the Clerk of said Court.

#4

1/12/48. Exemplified copy of application for marriage license and certificates of marriage of Madoline Johnson and Thomas Burroughs on August 30, 1942.

#5

1/12/48. Exemplified copy of decree of divorce entered in the action of Madoline Burroughs vs. Thomas Burroughs [fol. 58] in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on July 26, 1945, and of the Judgment role of record and on file in the Office of the Clerk of said Court.

#6

1/12/48. Check made and signed by Madoline Johnson, dated August 15th, 1942, payable to the order of Forsythe Caro in the sum of $50.00; check book and deposit pass book of the account of Madoline Johnson in the Garden City Bank and Trust Company.

#1

5/12/48. Lease dated February 9, 1940, between Realty Associates Security Corporation, landlord, and Edward Bruce Johnson and Madoline Johnson, his wife, tenants, residing at 8267 Austin Street, Kew Gardens, Long Island, of premises 59 Cambridge Avenue, Garden City, Long Island, for a period of one year, commencing March 15, 1940.

#2

5/12/48. Agreement of lease between Henry and Jessie May Learmonth, landlords, and E. Bruce Johnson, residing at 59 Cambridge Avenue, Garden City, New York, tenant, of premises #12 Fifth Place, Garden City, Nassau County, Long Island, N. Y., for one year commencing March 15, 1941.

#3

5/12/48. Undated letter of Madoline Johnson, addressed to decedent, written from Pensacola, Florida.

[fol. 59]

#4

5/12/48. Western Union Telegram dated February 11, 1942, sent by Madoline Johnson to decedent from Pensacola, Florida.

#5

5/12/48. Western Union Telegram dated February 18, 1942, sent by Madoline Johnson to decedent from Flomaton, Alabama.

#6

5/12/48. Certified photostatic copy of application by Madoline Johnson, dated January 4, 1940, to the New York State Bureau of Motor Vehicles, for operator's license.

#7

5/12/48. Certified photostatic copy of application by Madoline Burroughs in 1943, to the New York State Bureau of Motor Vehicles for renewal of operator's license.

Respondent's Exhibits

#A

5/12/48. Certified copy of proceedings instituted in the Court of Record in Escambia County, Florida, by Madoline Johnson against the decedent for absolute divorce, which proceedings were dismissed on February 16, 1942.

Dated: October 27th, 1948.

Saul Hammer, Attorney for Appellant; Thomas Berry, Attorney for Respondent.

[fol. 60] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the Record as hereinbefore printed consists of true and correct copies of the Notice of Appeal, Order and Decree appealed from, the Minutes of Hearings and all the papers used before the Court below in making the Order and Decree appealed from, and the whole thereof, now on file in the office of the Clerk of the Surrogate's Court, Nassau County, except as omitted or summarized by stipulation. Certification of the Clerk, pursuant to Section 616 of the Civil Practice Act, of the said Record hereinbefore printed, is hereby waived.

Dated, New York, January —, 1949.

LeRoy G. Edwards, Attorney for Eleanor Muelberger, Petitioner; Thomas Berry, Attorney for Genevieve Johnson, Respondent.

[fol. 61] SURROGATE'S COURT OF THE COUNTY OF NASSAU

NOTICE OF APPEAL TO THE COURT OF APPEALS—July 6, 1949

SIRS:

Please Take Notice that Eleanor Muelberger, the petitioner in the above entitled proceeding herein, hereby appeals to the Court of Appeals of the State of New York, from an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the Office of the Clerk of said Appellate Division, of the Supreme Court, Second Judicial Department, on the 16th day of May, 1949, affirming an order and decree (one paper) of the Surrogate's Court of the County of Nassau, made and [fol. 62] entered the 28th day of July, 1948, determining that Genevieve Johnson, the respondent in the above entitled proceeding, is the surviving spouse of the decedent and that the notice of election filed by her in that capacity is valid and effective, and from each and every paper of said order and decree.

Please Take Further Notice that Eleanor Muelberger, the petitioner in the above entitled proceeding herein, hereby appeals to the Court of Appeals as of right, pursuant to Section 588, Sub. 1 (a) of the Civil Practice Act.

Dated, Mineola, N. Y., July 6th, 1949.

Yours, etc., LeRoy G. Edwards, Attorney for Eleanor Muelberger, Petitioner-Appellant, Office & P. O. Address, 1539 Franklin Avenue, Mineola, New York.

To Thomas Berry, Esq. and Hunley & Meade, Esqs., Attorneys for Genevieve T. Johnson, Respondent, Plaza Building, Great Neck, New York; Clerk of the Surrogate's Court, County of Nassau, New County Court House, Mineola, Nassau County, N. Y.

[fol. 63] At a Term of the Appellate Division of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 16th day of May, 1949.

Present: Hon. Gerald Nolan, Presiding Justice; Hon. William B. Carswell, Hon. Charles W. U. Sneed, Hon. Henry G. Wenzel, Jr., Hon. John MacCrate, Justices.

ORDER OF AFFIRMANCE OF APPELLATE DIVISION, APPEALED FROM—May 16, 1949

The above named Eleanor Muelberger, the petitioner in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order and decree (one paper) of the Surrogate's Court of the County of Nassau, made on the 28th day of July, 1948, determining that respondent was the surviving spouse of decedent and that a notice of election filed by her in that capacity was valid and effective herein, and said appeal having been submitted by Mr. LeRoy G. Edwards of Counsel for Appellant and submitted by Mr. John H. Munley of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

[fol. 64] It is ordered and adjudged that the order and decree (one paper) of the Surrogate's Court of the County of Nassau, so appealed from, be and the same hereby is unanimously affirmed with costs to respondent, payable out of the estate.

Enter.

John J. Callahan, Clerk.

OPINION OF THE APPELLATE DIVISION—Dated May 16th, 1949

Appeal from an order and decree (one paper) of the Surrogate's Court, Nassau County, determining that respondent was the surviving spouse of decedent and that a notice of election filed by her in that capacity was valid and effective. Appellant, decedent's child and sole legatee under his will, claimed that respondent's marriage to decedent was void on the ground that a divorce obtained from decedent in Florida by a former wife, in which action he had appeared, was invalid because of failure to comply with the residence requirements of that state. Order and decree unanimously affirmed, with costs to respondent, payable out of the estate (Shea v. Shea, 270 App. Div. 527).

[fol. 65] STIPULATION WAIVING CERTIFICATION OF RECORD TO THE COURT OF APPEALS—November 16, 1949

It Is Hereby Stipulated that the foregoing consists of a true copy of the Record on Appeal and the Opinion of the Appellate Division, Second Department as filed with the Clerk of the said Appellate Division, the Notice of Appeal

to the Court of Appeals, the Order of Affirmance of the Appellate Division; all of which are on file in the office of the Clerk of the Surrogate's Court, Nassau County.

Certification thereof is hereby waived pursuant to Section 616 of the Civil Practice Act.

Dated, New York, November 16, 1949.

LeRoy G. Edwards, Attorney for Appellant; Thomas Berry, and Munley & Meade, Attorneys for Respondent.

[fols. 66-67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Estate of E. BRUCE JOHNSON, Deceased.
ELEANOR MUELBERGER, Appellant; GENEVIEVE JOHNSON, Respondent

OPINION—April 13, 1950

LEWIS, J.:

This appeal, taken by petitioner as of right on constitutional grounds (N. Y. Const., art. VI, § 7, subd. [1]; Civ. Prac. Act. § 588, subd. 1, cl. [a]), presents for review an order of the Appellate Division unanimously affirming a Surrogate's decree adjudging to be valid and effective under section 18 of the Decedent Estate Law an election by the respondent, Genevieve T. Johnson, as surviving spouse of E. Bruce Johnson, deceased, to take as in intestacy a share of the decedent's estate.

The petitioner-appellant is the daughter of the decedent and sole legatee under his will. Following probate proceedings the respondent, claiming to be the testator's widow, served and filed a notice, pursuant to section 18 of the Decedent Estate Law, declaring her election to take against decedent's will her intestate share of his estate. Thereupon the petitioner instituted this proceeding under section 145-a of the Surrogate's Court Act to obtain a determination of the validity of such election.

The petitioner is the child of the decedent's first marriage. After the death of his first wife the decedent in 1939 married Madoline Ham, from whom he was divorced in

1942 by a Florida decree the validity of which is a decisive factor in this proceeding. In 1944 the decedent and the respondent entered into the marriage—now challenged by the petitioner as void—which is the basis for the respondent's present claim of widowhood and for her statutory election to take an intestate share of the decedent's estate.

As an item in our consideration of this case we note judicially the fact that in 1942, a statute of Florida provided—"In order to obtain a divorce the complainant must have resided ninety days in the state of Florida before the filing of the bill of complaint." (Fla. Stat. Ann., § 65.02.)* In [fol. 69] the light of that statutory requirement we have examined the record of hearings had before the Surrogate, at which evidence was received referable to the 1942 Florida divorce action instituted against the decedent by his second wife, Madoline Ham Johnson. We find no evidence, within the jurisdictional requirement of the Florida statute, quoted (*supra*), that the plaintiff "* * * resided ninety days in the state of Florida before the filing of the bill of complaint." Furthermore, there is evidence, which stands undisputed, that for a period of at least two years prior to the date in 1942 when the Florida divorce action was instituted by her, Madoline Ham Johnson resided in the State of New York, except for three months in the winter of 1941-1942 when she went to Florida for a brief period. During that brief sojourn she instituted a divorce action which was formally withdrawn by her on February 16, 1942, and within a week thereafter she returned "home"—to use her word—to the decedent, who then resided in the State of New York. Thereafter she remained in the State of New York until early in June, 1942, when she went to Florida where, on July 29, 1942, she filed a bill of complaint against the decedent in the action for divorce here in controversy. In that connection there is evidence, which is conceded by the petitioner, that in the 1942 Florida divorce action the decedent appeared by attorney and interposed an answer to his wife's complaint, which answer denied allegations of his misconduct but did not put at issue the plaintiff's allegation that she had resided in Florida continuously for more

---

* The time factor in the Florida statute has been interpreted by the courts of that State to mean ninety days *next* preceding the filing date. (*Curley* v. *Curley*, 144 Fla. 728, 731.)

than a period of two years immediately preceding the filing of her bill of complaint.

The petitioner in the present proceeding asserts that respondent's marriage to the decedent was void because the 1942 Florida divorce action was legally ineffective to dissolve decedent's second marriage, the alleged invalidating factor being the failure by the plaintiff in that action to comply with statutory requirements as to residence then effective in that State. Ruling that the decree of divorce granted by the Florida court in 1942 is entitled to full faith and credit in the State of New York, the Surrogate wrote:

"In the Florida court, the decedent appeared by attorney and interposed an answer denying the wrongful acts but not questioning the allegations as to residence in Florida. The record discloses that testimony was taken by the Florida court and the divorce granted Madoline Johnson. Both parties had full opportunity to contest the jurisdictional issues in that court and the decree is not subject to attack on the ground that petitioner was not domiciled in Florida.

"Since the decree is valid and final in the State of Florida, it is not subject to collateral attack in the courts of this state."

Mindful of the undisputed facts recited by the Surrogate as the basis for his decision—which decision has met with unanimous affirmance at the Appellate Division—and it [fol. 70] appearing without dispute that the plaintiff is in law a stranger to the divorce action instituted in a Florida court in 1942, we are to determine whether the courts below rightly ruled against the petitioner's challenge, on jurisdictional grounds, to the Florida divorce decree and rightly accorded to that decree full faith and credit in the State of New York.

It cannot be denied that after the decedent had appeared in the 1942 Florida divorce action and filed an answer but had not availed himself of the opportunity afforded him to assert the plaintiff's failure to comply with statutory requirements then prevailing as to residence, neither he nor his second wife, Madoline Ham Johnson, as parties to that action, could thereafter challenge on jurisdictional grounds the validity of the divorce decree which followed. (*Davis* v. *Davis*, 305 U. S. 32, 40.)

The rule of the case last cited was defined in *Sherrer* v. *Sherrer* (334 U. S. 343, 351-352) as follows: "We believe

that the decision of this Court in the *Davis* case [305 U. S. 32] and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar *a defendant* from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by *the defendant* in the divorce proceedings, where *the defendant* has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree." (Emphasis supplied.) (And see *Coe* v. *Coe*, 334 U. S. 378, 384.) Indeed, the scope of the *Sherrer* case (*supra*) rule has a like limitation, as shown by the following excerpt from the opinion (p. 349): "The question with which we are confronted, therefore, is whether such a finding [of requisite jurisdictional facts] *made under the circumstances presented by this case* may, consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought *by the defendant in the original proceedings.*" (Emphasis supplied.)

In this jurisdiction we have repeatedly disallowed such a challenge by a party who has appeared in the action and filed an answer but has not availed himself of the opportunity afforded him to assert failure by the opposing party to present evidence which brings the case within the court's jurisdiction. (*Tiedemann* v. *Tiedemann*, 225 N. Y. 709; *Pearson* v. *Pearson*, 230 N. Y. 141, 148; *Borenstein* v. *Borenstein*, 272 N. Y. 407; *Glaser* v. *Glaser*, 276 N. Y. 296, 299; *Hess* v. *Hess*, 276 N. Y. 486; *Vernon* v. *Vernon*, 288 N. Y. 503.)

There are, however, pronouncements clearly indicating that where jurisdictional facts upon which rests a foreign divorce decree fall short of meeting statutory requirements then effective in the foreign State, a stranger to the divorce [fol. 71] action—as is the present petitioner—is not deprived of the right by collateral attack to challenge the validity of the decree. Thus in *Williams* v. *North Carolina* (325 U. S. 226), the view of a majority of the court on this subject was expressed at page 230: "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. *This applies also to jurisdictional questions.* After a contest these can-

not be relitigated *as between the parties.* [Citing cases.] *But those not parties to a litigation ought not to be foreclosed by the interested actions of others;* * * *." (Emphasis supplied.)

This court has recently had occasion to apply that rule which allows third parties to attack a foreign divorce judgment on jurisdictional grounds. (See *Matter of Lindgren*, 293 N. Y. 18, 23; *Urquhart* v. *Urquhart*, 272 App. Div. 60, affd. 297 N. Y. 689; *Senor* v. *Senor*, 272 App. Div. 306, 312, affd. 297 N. Y. 800.) In connection with the application of that principle it should be said that the argument that a decree of divorce operates in rem and therefore must be wholly good or wholly bad, is met by a statement in *Williams* v. *North Carolina* (325 U. S. 226, *supra*, at p. 232): "Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions *in rem*. *Williams* v. *North Carolina*, *supra*, at 297. [317 U. S. 287.] But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party to a proceeding *in rem*. See *Brigham* v. *Fayerweather*, 140 Mass. 411, 413, 5 N. E. 265, quoted in *Tilt* v. *Kelsey*, *supra*, at 52. [207 U. S. 43.] All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."

Under the authority conferred by section 1 of article IV of the Federal Constitution, Congress has enacted that judgments "shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken." (1 U. S. Stat. 122, now U. S. Code, tit. 28, § 1738.) That provision has been interpreted by the Supreme Court of the United States to mean—"* * * that which has been adjudicated in one state" shall be "*res*

judicata to the same extent in every other." (Emphasis [fol. 72] supplied.) *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 438.) Thus appears in statutory form a doctrine announced by Chief Justice Marshall in *Hampton* v. *M'Connel* (3 Wheat. [U. S.] 234, at p. 235), that "* * * the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." That view survives today substantially intact. (*Fauntleroy* v. *Lum*, 210 U. S. 230, 236-237; *Williams* v. *North Carolina*, 317 U. S. 287, 293-294.)

Under the Florida divorce statute (Fla. Stat. Ann., § 65.02, quoted *supra*) and the decisions of the courts of that State thereunder, the statutory requirement of ninety days' residence next preceding the filing of a divorce bill goes to the jurisdiction of the court assuming to grant the divorce decree. (*Phillips* v. *Phillips*, 146 Fla. 311, 320.) Compliance with that requirement cannot be proved or obviated by admission of the parties. "Such residence being jurisdictional, an admission thereof by the parties in their pleadings is ineffectual as a substitute for proof. The requisite residence must be alleged in the bill and established by proof. This is not an instance in which facts going to the jurisdiction may be effectually admitted by the parties." (*Wade* v. *Wade*, 93 Fla. 1004, 1006-1007; and see *Taylor* v. *Taylor*, 132 Fla. 690, 696.)

It follows in this proceeding that the petitioner, a stranger to the Florida divorce action and decree, could successfully challenge the validity of that decree in collateral proceedings in the courts of Florida by producing proof of fraudulent circumstances under which it was obtained. (See *State ex rel. Willys* v. *Chillingworth*, 124 Fla. 274, 278-279.) To hold that she could not do likewise in this State would be to give to the Florida decree a more conclusive effect here than it would have in Florida.

The conclusion we have reached is further reinforced by the following excerpt from the opinion in *Williams* v. *North Carolina* (325 U. S. 226, 229, *supra*)—"But the [Full Faith and Credit] Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447-48. 'To give

it the force of a judgment in another state, it must be made a judgment there.' *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 325. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.

[fol. 73] " 'It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction * * *.' It was 'too late' more than forty years ago. *German Savings Society* v. *Dormitzer*, 192 U. S. 125, 128."

The order of the Appellate Division should be reversed and the proceeding remitted to the Surrogate's Court of Nassau County for further proceedings not inconsistent with this opinion, with costs in this court and in the Appellate Division to abide the event. The motion herein by respondent to dismiss the appeal taken by the petitioner on constitutional grounds should be denied.

Loughran, Ch. J., Conway, Desmond, Dye, Fuld and Froessel, JJ., concur.

Ordered accordingly.

[fol. 74] I. Court of Appeals of New York

Remittitur—April 14, 1950

In the Matter of the Application of Eleanor Muelberger, for Determination of the Right of Genevieve Johnson, &c. to Elect to Take an Intestate share &c. Last Will and Testament of E. Bruce Johnson, Deceased. Eleanor Muelberger, Appellant; Genevieve Johnson, Respondent

Be it Remembered, That on the 21st day of November, in the year of our Lord one thousand nine hundred forty-nine, Elganor Muelberger, the Appellant, in this cause, came here unto the Court of Appeals, by LeRoy G. Edwards, her attorney, and filed in the said Court a Notice of Apeal and return thereto from the order of the Appellate Division of

the Supreme Court in and for the Second Judicial Department.

And Genevieve Johnson, the respondent, in said cause, afterwards appeared in said Court of Appeals by Thomas Berry and Munley & Meade, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Saul Hammer, of Counsel for the appel- [fol. 75] lant, and submitted by counsel for the respondent, motion to dismiss appeal argued with appeal and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and proceeding remitted to the Surrogate's Court for further proceedings not inconsistent with the opinion herein, with costs in this Court and in the Appellate Division to abide the event. Motion to dismiss appeal denied.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court, Nassau County there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed and proceeding remitted to the Surrogate's Court for further proceedings &c. as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court, Nassau County, before the Surrogate thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogate thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York. (Seal)

[fol. 76] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No.—

In the Matter of GENEVIEVE JOHNSON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 9, 1950.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of July, 1950.

[fol. 77] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 296

ORDER ALLOWING CERTIORARI—Filed November 6, 1950

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U. S.
FILED
DEC 26 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Bowen Bldg.,
Washington, D. C.,
Counsel for Petitioner.

JOHN H. MUNLEY,
GEORGE J. MEADE,
Great Neck, N. Y.,
Of Counsel.

INDEX

Subject Index

	Page
Jurisdiction	1
Opinions below	1
Questions presented	2
Statement	2
Specification of Errors to be Urged	5
Way in which Federal Question was raised	5
Summary of Argument	5
Conclusion	14

Cases Cited

Coe v. *Coe*, 334 U. S. 378	2, 5, 7, 9, 10
Davis v. *Davis*, 305 U. S. 32	5, 7, 9
deMarigny v. *deMgrigny*, 43 So. Sec. 442	6, 11
Gaylord v. *Gaylord*, 45 St. Sec. 507	6, 11, 13
Sherrer v. *Sherrer*, 334 U. S. 343	5, 7, 9
Stoll v. *Gottlieb*, 305 U. S. 165	7
Watson v. *Watson*, 172 S. C. 362	8
Williams v. *North Carolina*, 325 U. S. 226	5, 6, 9, 10

Statutes Cited

Fla. Stat. 65.02	5
28 U. S. C. Sec. 1257 (3)	1
28 U. S. C. Sec. 1737	5
28 U. S. C. Sec. 1738	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3). The judgment of the New York Court of Appeals was entered April 14, 1950 (R. 51). An order of this Court extending the time to file a petition for a writ of certiorari was granted by Mr. Justice Burton on July 7, 1950, extending such time up to and including September 9, 1950 (R. 53). Order granting Writ was entered November 6, 1950.

Opinions Below

The opinion of the Surrogates Court is unreported but may be found at R. 39. The memorandum opinion of the

Appellate Division may be found in the record at p. 44 and is reported in 275 Appel. Div. 848. The opinion of the Court of Appeals appears in the record at p. 45 and is reported in 301 N. Y. 13 and 92 N. E. (2) 44.

Questions Presented

1. Respondent, the daughter of decedent E. Bruce Johnson by marriage No. 1 [1] and sole legatee under his Will, contested in the New York Surrogate's court petitioner's election to take her widow's portion (as wife No. 3) on the ground that decedent's Florida divorce from wife No. 2, in which husband and wife both appeared, was invalid. The court below, reversing the Surrogate and the Appellate Division, held the Florida divorce invalid on the ground that the proceedings before the Surrogate showed no affirmative evidence that the wife had resided ninety days in Florida as required by Florida law, prior to instituting her divorce suit. Hence the court below held the third marriage was void.

As under *Coe* v. *Coe*, 334 U. S. 378 the father could not assail the Florida decree, the question is presented whether the court below has not violated the Full and Credit Clause of the Federal Constitution and 28 U.S.C. 1738 by permitting the daughter to do so after his death. After all, the father's right to will his daughter property is subject to the widow's claim resulting from a marriage he cannot under *Coe* v. *Coe*, *supra*, assail.

Statement

The petitioner, Genevieve Johnson, married the decedent, E. Bruce Johnson, on the 19th day of February, 1944, at Great Neck, New York (R. 22). The decedent died June

[1] The first wife died and decedent married Madoline Ham, wife No. 2.

29, 1945 (R. 23), leaving a Last Will and Testament dated April 21, 1943, which was duly admitted to Probate in the Surrogates Court of Nassau County on August 27th, 1945, Eric Muelberger, Jr., being appointed executor (R. 4). By the terms of the Will the decedent beqeathed his entire estate to the respondent, Eleanor Muelberger (R. 4).

Following Probate Proceedings the Petitioner, Genevieve Johnson, his widow, filed a notice pursuant to Section 18 of the Decedent's Estate Law of the State of New York declaring her election, as widow, to take against decedent's Will her intestate share of his estate (R. 4). Thereupon the respondent, Eleanor Muelberger, instituted a proceeding under Section 145a of the Surrogates Court Act of the State of New York to obtain a determination of the validity of such election (R. 3).

The respondent, Eleanor Muelberger, is the wife of the executor, Eric Muelberger, and is a daughter of the decedent by his first marriage (R. 29, 45). After the death of his first wife, the decedent in 1939 married Madoline Ham, from whom he was divorced in 1942 by a Florida Decree (R. 12, 40).

In such divorce action instituted by the second wife, Madoline Ham Johnson, the decedent appeared by Attorney and interposed an answer denying the wrongful acts, but not questioning the allegations as to her residence in Florida. Testimony was taken by the Florida Court and the divorce granted Madoline Ham Johnson (R. 12, 39).

The respondent, Eleanor Muelberger, claimed below that the petitioner, Genevieve Johnson, the widow of the decedent could not be his lawful widow due the fact that the divorce obtained by Madoline Ham Johnson, the second wife, was invalid because of failure to comply with residential requirements and that the same was obtained in the State of Florida by sham and fraud (R. 5). The evidence ad-

duced upon the trial in the Surrogates Court of Nassau County with reference to the disputed divorce discloses that prior to the divorce both husband and wife resided in Garden City, New York until sometime before Thanskgiving of 1941 (R. 36) at which time Madoline Ham Johnson left her husband and went to Florida, where she instituted an action for divorce against her husband in November 1941, in which the decedent appeared and did not contest the jurisdiction. This action was discontinued and dismissed in February 1942 (R. 26, 46). Afterwards, Madoline Ham Johnson returned to decedent at Garden City, New York (R. 31, 46). During the month of April, 1942, she again left the decedent and went to live in West Hempstead, New York (R. 13, 31). On or about June 7, 1942, the itinerant second wife again left New York for Pensacola, Florida, where she resided (R. 15, 21).

On July 29, 1942, Madoline Ham Johnson for the second time filed a bill of complaint against the decedent for an absolute divorce in the Court of Record in Escambia County, Florida, out of which a final decree of divorce was entered against the decedent on August 17, 1942 (R. 11, 40). This is the decree attacked by the respondent, Eleanor Muelberger, even though her father appeared in the action by a firm of attorneys and contested the major allegations of misconduct, but did not contest the jurisdiction of the Court (R. 11, 39).

After trial the Surrogates Court of Nassau County rejected the contentions of Eleanor Muelberger, the respondent, and found for the petitioner declaring her to be the widow of decedent (R. 39). The Appellate Division of the Supreme Court of the State of New York Second Judicial Department at Brooklyn, New York, unanimously affirmed the findings of the trial court (R. 44).

However, the Court of Appeals of the State of New York

reversed the findings of both lower Courts and directed judgment for respondent, Eleanor Muelberger (R. 51).

In effect the court held that while under *Davis* v. *Davis*, 305 U. S. 32, 40, *Sherrer* v. *Sherrer* and *Coe* v. *Coe*, 334 U. S. 378, 384, the *decedent*, after appearance, could not attack the Florida decree, a stranger could do so under the dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, 232 (R. 48, 49). The court went on to hold that under Florida law (Fla. Stat. 65.02) proof of ninety days residence could not be supplied by admission of the parties and hence the Florida divorce was void.

Specification of Errors to Be Urged

The Court below erred in refusing to give full faith and credit to the Florida Court's decree of divorce of decedent from Madoline Ham Johnson.

Way in Which Federal Question Was Raised

The Full Faith and Credit clause and the Federal Statute (28 U.S.C. Sec. 1737) were asserted by petitioner's motion to dismiss filed in the trial court (R. 22). It was the basis of the ruling of the Surrogate (R. 39) and the affirmance by the Appellate Division (R. 44). It was discussed by the court below in its opinion (R. 49) and its alleged inapplicability is the obvious basis for its judgment.

Summary of Argument

1. The decided cases, in this Court, *infra*, are dispositive of the inability of the father of petitioner in this case to do what the Court of Appeals of the State of New York has permitted petitioner to do. Neither her father nor his wife could have challenged the Florida decree herein on jurisdictional grounds. The decision of the Court below, however, confers upon the father through petitioner the ability after

death in substance to do by will what he could not have done during his life time. Thus it seems incongruous for example to hold that he could not pass title to his real estate during his life time, free and clear of the wife's inchoate right to dower, yet, at the same time, he could accomplish the same effect after death by devising his real estate to his daughter, knowing she could bar his widow's right to dower by then successfully attacking the validity of the divorce decree. This, too, in the face of the fact that every right the daughter claims derives from her father and that he, as husband, was estopped during his life time to deprive his wife of any right which accrued to her from that marriage relation which both parties assumed in good faith and maintained until the husband's death. As between the daughter and the wife here the daughter ought not to be construed to be a "stranger" in the sense of *Williams* v. *North Carolina*, 325 U. S. 226, 230. *Williams* v. *North Carolina* should not be expanded within the facts of this record to permit the respondent herein to question the validity of the divorce decree which her father could not have assailed.

II. It is respectfully submitted that the Court of Appeals below failed to take into consideration the more recent decisions of the State of Florida on the right successfully to challenge the validity of a decree of divorce in a collateral attack in the courts of that State by producing proof of fraudulent circumstances under which the decree was obtained. The respondent herein being neither a party to the action which matured to the decree attacked here, nor entitled to manage said action nor appeal from it, ought not to be allowed to impeach it now when the widow of her father seeks to assert her right as widow in the property of her deceased husband. *deMarigny* v. *deMarigny* and *Gaylord* v. *Gaylord*, *infra*, deny the right thus successfully to challenge the validity of this decree in the courts of Florida.

Point I

Respondent, Eleanor Muelberger, as derivative successor to deceased father, is estopped from collaterally attacking in the State of New York a decree of divorce granted by a Florida Court in which proceeding father and former spouse appeared and participated.

The United States Supreme Court in *Coe* v. *Coe*, 334 U. S. 378, *Davis* v. *Davis*, 305 U. S. 32, and *Sherrer* v. *Sherrer*, 334 U. S. 343, enunciated the principle that a spouse who participates in a divorce decree is thereafter precluded from attacking its validity in a sister state.

The question raised now and not heretofore precisely decided by this Court is whether the rule propounded in the above cited cases should not be extended to embrace children of a prior marriage or third persons, so as to prohibit a collateral attack upon a decree of divorce such as was granted below. In *Stoll* v. *Gottlieb*, 305 U. S. 165, the Court says:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end litigation as that there should be a place to begin litigation. After a party has his day in Court, with opportunity to present his evidence and his view of law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Sherrer v. *Sherrer*, *supra* (at pp. 355-356), reiterated in essence the rule of the *Stoll* case in the following language:

> "The Full Faith and Credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation. If in its

> application local policy must at time be required to give way, such 'is part of the price of our federal system'. Williams *v.* North Carolina, 317 U. S. 287 . . . We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. That vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation. And where a decree of divorce is rendered by a competent court under the circumstances of this case (Sherrer), the obligation of the full faith and credit clause requires that such litigation should end in the courts of the State in which the judgment was rendered."

Petitioner contends that respondent, being an heir at law, stands in the shoes of the ancestor and that she is, therefore, estopped to question anything that the ancestor was estopped from asserting. A situation similar to the one before the Court occurred in *Watson* v. *Watson*, 174 S. E. 33, 172 S. C. 362 (1934). In that case the decedent obtained a divorce in Nevada from his wife who resided in South Carolina. The wife was served with a summons in the State of South Carolina but did not appear in the action. Subsequently, the husband remarried and lived with his second spouse for a period of five years and then died. His child by the first marriage sought to cut off the dower right of wife No. 2 by attacking the Nevada decree. The Court, in deciding in favor of Wife No. 2, said:

> "This action is one relating solely to property rights unaffected by any considerations which give to the marriage relation its precise status. (Wey *v.* Wey, 132 S. C. 294, 128 S. E. 705). So here we are dealing only with property rights and the action of the husband

in procuring wife No. 2 to marry him on the assumption that he had a good divorce and was entitled to marry and this estops him from denying to her the right in his property to which she would be entitled had his assumption been true. She changed her position materially and rendered near five years, etc. in consideration of his leading her to believe that he had a right to marry her and he and his heirs now when it comes to the disposition of his estate are estopped from denying her the rights to which she would be entitled had the divorce been valid and of force in South Carolina."

Petitioner submits that to sustain the holding herein will permit a child of a prior marriage to contest the validity of a divorce between her parent and a second wife and pave the way for collateral attack by any ordinary legatee. Such holding will effect utter chaos and make a second marriage so dangerous that the legitimacy of a portion of the populace would be seriously questioned.

The decision below seems plainly violative of this Court's holding in *Coe* v. *Coe*, 334 U. S. 378, wherein the defendant wife admitted as true the husband's allegations of Nevada residence and the Nevada Court entered a divorce decree in favor of the wife. This court held that the wife could not later attack the Nevada decree in Massachusetts because, this Court held, the decree "was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunities to contest the jurisdictional issues." The court below conceded that on this ground neither the decedent nor his then wife could thereafter challenge the Florida decree on jurisdictional grounds, citing *Davis* v. *Davis*, 305 U. S. 32, 40, and *Sherrer* v. *Sherrer*, 334 U. S. 343, 351. However, it seized upon this Court's dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, that "those not parties to a litigation ought not to be foreclosed by the

interested actions of others" and on this basis held that the daughter by the first marriage could attack the jurisdiction of the Florida court in order to bar the widow.

It seems clear that the court below misapplied the *Williams* case which was limited to the power of a sovereign *State* to ascertain, in a criminal trial, the evidence of a crucial jurisdictional fact in foreign divorce proceedings (*Williams*, Op. p. 230). There being no question, under *Coe* v. *Coe*, *supra*, of the binding effect of the Florida divorce upon decedent, the effect of the decision below is retroactively to loose the chains that bind him to the Florida decree by allowing him to make a Will barring petitioner, his present wife. It is incongruous to say that the decedent is bound by the Florida decree but that his daughter, the recipient of his munificence by Will, may ignore it and eliminate the widow whose right to her widow's portion has vested by a marriage her husband could not assail under *Coe* v. *Coe*, *supra*. It must be remembered that the daughter's right to contest the widow's election under Section 145a of the Surrogate's Court Act flows from her status as sole beneficiary under the Will.[2] Hence she is not, in any sense, a "stranger" in the sense of *Williams* v. *North Carolina*, 325 U. S. 226, 230 but can take only such property as her father possessed under the Full Faith and Credit clause as the result of the Florida divorce and his subsequent marriage.

It would seem important that this Court's holding in *Williams* v. *North Carolina*, 325 U. S. 226 at 230, should not be expanded to permit a daughter whose only right

[2] Sec. 145-a of the Surrogates Court Act provides that "any person interested in obtaining a determination as to the validity or effect of any election to take an intestate share against the provisions of a will * * * may present * * * a petition setting forth the facts which show his interest * * * and the particular question concerning which he requests the determination of the court." 13 Gilbert-Bliss Civil Practice of New York Annotated Sec. 145-a.

flows from her father's Will to deny the validity of a divorce decree which the father himself cannot assail in making the Will. If this is permitted, particularly after the death of the father, doubt may be cast upon a divorce when one of the parties thereto is no longer alive to testify even as to jurisdictional facts. The legitimacy of children might even be questioned.

Point II

The Court of Appeals of the State of New York erred in concluding that the State of Florida permits a collateral attack by a stranger to a divorce decree.

In the opinion of the Court of Appeals (R. 50) it is stated that the respondent herein could successfully challenge the validity of the decree of divorce in a collateral proceeding in the Courts of Florida by producing proof of fraudulent circumstances under which it was obtained. Apparently, the Court of Appeals overlooked the more recent decisions of Florida on that score, to wit: *deMarigny* v. *deMarigny*, 43 So. Sec. 442, decided December 20, 1949, and *Gaylord* v. *Gaylord*, 45 So. Sec. 507, decided April 11, 1950.

In *deMarigny* v. *deMarigny* the plaintiff sought to obtain a declaratory judgment declaring void a divorce obtained by the defendant from his first wife in the state of Florida. She based her case upon the inadequacy of residence of the plaintiff in the divorce proceeding because of the fact that she was in the state of Florida on a temporary visitor's visa from her native France and further that, in addition to the foregoing infirmity, the Court did not and could not acquire jurisdiction of the parties or subject matter because the plaintiff in such divorce proceeding did not reside in the state of Florida for more than ninety days preceding the

filing of her bill of complaint. It was also contended that the plaintiff in said divorce action returned to her home in France immediately following the entry of the final decree of divorce. The Court, in dismissing the action, said:

> "Assuming that the court should, in a sense, represent the State as an interested third party in a proceeding of this kind, it is our view that the interests of society would be better served by an adoption of the lesser of two evils—non datur tertium. We mean that if the parties are left as the court found them an alleged fraud upon the court might thus appear to be sanctioned; yet, on the other hand, a judgment favorable to appellant-petitioner would amount to a judicial determination that both the appellant-petitioner and the appellant-respondent Alfred F. deMarigny had lived in a manifest state of adultery and would open wide an avenue for fraud (not to mention blackmail) of a character most difficult to discover. If the appellant-petitioner may maintain the instant suit it would be possible for any party to a fraudulent divorce decree, which is valid on the face of the record, to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly. It is our conclusion that the lesser evil would result from a judgment unfavorable to the appellant-petitioner's position and that decency, good morals and the welfare of society would be more nearly satisfied by such ruling. Certainly, such a decision would be less inimicable to the interests of our citizens as a whole than one favorable to the appellant-petitioner for the latter, in our opinion, could lead to "widespread social disorder". See *Shea* v. *Shea*, 270 App. Div. 527, N. Y. S. 2d 823, at page 827.

The decree of divorce which is under attack by the appellant-petitioner has not adversely affected the status or rights of the appellant-petitioner which existed at the time of the entry of said decree. Indeed,

it has protected her (and such protection continues) in her after-acquired marital status for without it her relationship with deMarigny necessarily would have been classified as meretricious.

As aforestated, the appellant-petitioner was neither defrauded nor injured for she occupied no status and had no rights at the time of the entry of the divorce decree sought to be invalidated which were or could have been affected thereby. The law on this subject is as stated in Freeman on Judgments, Vol. 1, page 636, Section 319: "It must not, however, be understood that all strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect would be prejudiced in regard to some preexisting right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause, nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them as so to affect rights or interests acquired prior to its rendition."

In *Gaylord* v. *Gaylord*, *supra*, the plaintiff sued the defendant for divorce in the State of Florida. The defendant, as a defense to the action, alleged that the plaintiff had participated in a divorce proceeding in Alabama which was defective due to inadequacy of residence in that State; that, as a consequence, she was not lawfully divorced from her previous husband and, therefore, could not legally institute a divorce proceeding in Florida. The Court, in dismissing the defense interposed by defendant, said:

"The Alabama decree (if in the pleading before us for consideration the respondent actually occupies the role of defender) did not adversely affect "rights or interests" acquired by him prior to its rendition. Said decree stands, insofar as the face of the record is concerned, valid and unimpeached. The facts alleged in the counterclaim and cross-complaint as a basis for its invalidity can be established only by evidence dehors the record. It must be presumed that the Alabama

court which entered the challenged decree was a court of competent jurisdiction. Consequently, its decree is, at most, voidable only.

Respondent asserts that the law in the State of Alabama differs from our law in that it allows a collateral attack upon a decree which is valid on the face of the record. Our law is contra and we know of no rule or principle which requires or will permit us to invalidate such a final decree or judgment of a court of a foreign jurisdiction. The proper forum in which to attack the validity of such decree, (if, indeed, it may be attacked by the respondent in any court) is the jurisdiction in which it was rendered. We should not attempt to determine the validity of a decree of a sister state or of a foreign country. More certainly, we should not do so unless something appears on the face of the record which discloses its invalidity. The most we should do is to decide in proper cases (within which category this case does not fall) whether foreign decrees should be accorded recognition by the courts of Florida under the full faith and credit clause of the Federal Constitution, Art. 4, Sec. 1, or the rule of comity."

Conclusion

The judgment of the Court of Appeals of the State of New York should in all respects be reversed.

Respectfully submitted,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
1000 Bowen Building, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

JOHN H. MUNLEY, ESQ.,
GEORGE J. MEADE, ESQ.,
Great Neck, New York,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

SEP 9 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Bowen Bldg.
Washington, D. C.
Counsel for Petitioner.

JOHN H. MUNLEY,
GEORGE J. MEADE,
Great Neck, N. Y.,
Of Counsel.

INDEX

Subject Index

	Page
Jurisdiction	1
Opinions below	2
Questions presented	2
Statement	3
Way in which Federal Question was raised	5
Reasons for the allowance of the writ	5
Conclusion	7

Cases Cited

Coe v. *Coe*, 334 U. S. 378	2, 5
Davis v. *Davis*, 305 U. S. 32	5, 6
Sherrer v. *Sherrer*, 334 U. S. 343	5, 6
Williams v. *North Carolina*, 325 U. S. 226	5, 6, 7

Statutes Cited

Fla. Stat. 65.02	5
28 U.S.C. Sec. 1257(3)	1
28 U.S.C. Sec. 1737	5
28 U.S.C. Sec. 1738	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

against

ELEANOR MUELBERGER,

Respondent

RE: ESTATE OF E. BRUCE JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Genevieve Johnson, respectfully prays for the issuance of a Writ of Certiorari to review the judgment below.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3). The judgment of the New York Court of Appeals was entered April 14, 1950 (R. 51). An order of this Court extending the time to file a petition for a writ of certiorari was granted by

Mr. Justice Burton on July 7, 1950, extending such time up to and including September 9, 1950 (R. 53).

Opinions Below

The opinion of the Surrogates Court is unreported but may be found at R. 39. The memorandum opinion of the Appellate Division may be found in the record at p. 44 and is reported in 275 Appel. Div. 848. The opinion of the Court of Appeals appears in the record at p. 45 and is reported in 301 N. Y. 13 and 92 N. E. (2) 44.

Questions Presented

1. Respondent, the daughter of decedent E. Bruce Johnson by marriage No. 1 [1] and sole legatee under his Will, contested in the New York Surrogate's court petitioner's election to take her widow's portion (as wife No. 3) on the ground that decedent's Florida divorce from wife No. 2, in which husband and wife both appeared, was invalid. The court below, reversing the Surrogate and the Appellate Division, held the Florida divorce invalid on the ground that the proceedings before the Surrogate showed no affirmative evidence that the wife had resided ninety days in Florida as required by Florida law, prior to instituting her divorce suit. Hence the court below held the third marriage was void.

As under *Coe* v. *Coe*, 334 U. S. 378 the father could not assail the Florida decree, the question is presented whether the court below has not violated the Full and Credit Clause of the Federal Constitution and 28 U.S.C. 1738 by permitting the daughter to do so after his death. After all, the father's right to will his daughter property is subject to the widow's claim resulting from a marriage he cannot under *Coe* v. *Coe, supra*, assail.

---

[1] The first wife died and decedent married Madoline Ham, wife No. 2.

Statement

The petitioner, Genevieve Johnson, married the decedent, E. Bruce Johnson, on the 19th day of February, 1944, at Great Neck, New York (R. 22). The decedent died June 29, 1945 (R. 23), leaving a Last Will and Testament dated April 21, 1943, which was duly admitted to Probate in the Surrogates Court of Nassau County on August 27th, 1945, Eric Muelberger, Jr., being appointed executor (R. 4). By the terms of the Will the decedent bequeathed his entire estate to the respondent, Eleanor Muelberger (R. 4).

Following Probate proceedings the Petitioner, Genevieve Johnson, his widow, filed a notice pursuant to Section 18 of the Decedent's Estate Law of the State of New York declaring her election, as widow, to take against decedent's Will her intestate share of his estate (R. 4). Thereupon the respondent, Eleanor Muelberger, instituted a proceeding under Section 145a of the Surrogates Court Act of the State of New York to obtain a determination of the validity of such election (R. 3).

The respondent, Eleanor Muelberger, is the wife of the executor, Eric Muelberger, and is a daughter of the decedent by his first marriage (R. 29, 45). After the death of his first wife, the decedent in 1939 married Madoline Ham, from whom he was divorced in 1942 by a Florida Decree (R. 12, 40).

In such divorce action instituted by the second wife, Madoline Ham Johnson, the decedent appeared by Attorney and interposed an answer denying the wrongful acts, but not questioning the allegations as to her residence in Florida. Testimony was taken by the Florida Court and the divorce granted Madoline Ham Johnson (R. 12, 39).

The respondent, Eleanor Muelberger, claimed below that the petitioner, Genevieve Johnson, the widow of the decedent could not be his lawful widow due the fact that the

divorce obtained by Madoline Ham Johnson, the second wife, was invalid because of failure to comply with residential requirements and that the same was obtained in the State of Florida by sham and fraud (R. 5). The evidence adduced upon the trial in the Surrogates Court of Nassau County with reference to the disputed divorce discloses that prior to the divorce both husband and wife resided in Garden City, New York until sometime before Thanksgiving of 1941 (R. 36) at which time Madoline Ham Johnson left her husband and went to Florida, where she instituted an action for divorce against her husband in November 1941, in which the decedent appeared and did not contest the jurisdiction. This action was discontinued and dismissed in February 1942 (R. 26, 46). Afterwards, Madoline Ham Johnson returned to decedent at Garden City, New York (R. 31, 46). During the month of April, 1942, she again left the decedent and went to live in West Hemstead, New York (R. 13, 31). On or about June 7, 1942, the itinerant second wife again left New York for Pensacola, Florida, where she resided (R. 15, 21).

On July 29, 1942, Madoline Ham Johnson for the second time filed a bill of complaint against the decedent for an absolute divorce in the Court of Record in Escambia County, Florida, out of which a final decree of divorce was entered against the decedent on August 17, 1942 (R. 11, 40). This is the decree attacked by the respondent, Eleanor Muelberger, even though her father appeared in the action by a firm of attorneys and contested the major allegations of misconduct, but did not contest the jurisdiction of the Court (R. 11, 39).

After trial the Surrogates Court of Nassau County rejected the contentions of Eleanor Muelberger, the respondent, and found for the petitioner declaring her to be the widow of decedent (R. 39). The Appellate Division of the Supreme Court of the State of New York Second

Judicial Department at Brooklyn, New York, unanimously affirmed the findings of the trial court (R. 44).

However, the Court of Appeals of the State of New York reversed the findings of both lower Courts and directed judgment for respondent, Eleanor Muelberger (R. 51).

In effect the court held that while under *Davis* v. *Davis*, 305 U. S. 32, 40, *Sherrer* v. *Sherrer* and *Coe* v. *Coe*, 334 U. S. 378, 384, the *decedent*, after appearance, could not attack the Florida decree, a stranger could do so under the dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, 232 (R. 48, 49). The court went on to hold that under Florida law (Fla. Stat. 65.02) proof of ninety days residence could not be supplied by admission of the parties and hence the Florida divorce was void.

Way in Which Federal Question Was Raised

The Full Faith and Credit clause and the Federal Statute (28 U.S.C. Sec. 1737) were asserted by petitioner's motion to dismiss filed in the trial court (R. 22). It was the basis of the ruling of the Surrogate (R. 39) and the affirmance by the Appellate Division (R. 44). It was discussed by the court below in its opinion (R. 49) and its alleged inapplicability is the obvious basis for its judgment.

Reasons for the Allowance of the Writ

The decision below seems plainly violative of this Court's holding in *Coe* v. *Coe*, 334 U. S. 378, wherein the defendant wife admitted as true the husband's allegations of Nevada residence and the Nevada Court entered a divorce decree in favor of the wife. This court held that the wife could not later attack the Nevada decree in Massachusetts because, this Court held, the decree "was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full oppor-

tunities to contest the jurisdictional issues." The court below conceded that on this ground neither the decedent nor his then wife could thereafter challenge the Florida decree on jurisdictional grounds, citing *Davis* v. *Davis*, 305 U. S. 32, 40, and *Sherrer* v. *Sherrer*, 334 U. S. 343, 351. However, it seized upon this Court's dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, that "those not parties to a litigation ought not to be foreclosed by the interested actions of others" and on this basis held that the daughter by the first marriage could attack the jurisdiction of the Florida court in order to bar the widow.

It seems clear that the court below misapplied the *Williams* case which was limited to the power of a sovereign *State* to ascertain, in a criminal trial, the evidence of a crucial jurisdictional fact in foreign divorce proceedings (*Williams*, Op. p. 230). There being no question, under *Coe* v. *Coe, supra*, of the binding effect of the Florida divorce upon decedent, the effect of the decision below is retroactively to loose the chains that bind him to the Florida decree by allowing him to make a Will barring petitioner, his present wife. It is incongruous to say that the decedent is bound by the Florida decree but that his daughter, the recipient of his munificence by Will, may ignore it and eliminate the widow whose right to her widow's portion has vested by a marriage her husband could not assail under *Coe* v. *Coe, supra*. It must be remembered that the daughter's right to contest the widow's election under Section 145a of the Surrogate's Court Act flows from her status as sole beneficiary under the Will.[2] Hence she is not,

[2] Sec. 145-a of the Surrogates Court Act provides that "any person interested in obtaining a determination as to the validity or effect of any election to take an intestate share against the provisions of a will • • • may present • • • a petition setting forth the facts which show his interest • • • and the particular question concerning which he requests the determination of the court." 13 Gilbert-Bliss Civil Practice of New York Annotated Sec. 145-a.

in any sense, a "stranger" in the sense of *Williams* v. *North Carolina*, 325 U. S. 226, 230 but can take only such property as her father possessed under the Full Faith and Credit clause as the result of the Florida divorce and his subsequent marriage.

It would seem important that this Court's holding in *Williams* v. *North Carolina*, 325 U. S. 226 at 230, should not be expanded to permit a daughter whose only right flows from her father's Will to deny the validity of a divorce decree which the father himself cannot assail in making the Will. If this is permitted, particularly after the death of the father, doubt may be cast upon a divorce when one of the parties thereto is no longer alive to testify even as to jurisdictional facts. The legitimacy of children might even be questioned.

The Federal question presented herein was properly raised below and is novel and warrants this Court's issuance of the writ.

Conclusion

It is submitted that the present petition should be granted and the judgment below reversed.

Respectfully submitted,

WM. E. LEAHY,
WILLIAM J. HUGHES, JR.,
1000 Bowen Building, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

JOHN H. MUNLEY, Esq.,
GEORGE J. MEADE, Esq.,
Great Neck, New York,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 18 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

against

ELEANOR MUELBERGER,

Respondent.

RE: ESTATE OF E. BRUCE JOHNSON

RESPONDENT'S OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

LOUIS FLATO,
Attorney for Respondent,
11 East 44th Street,
New York City, N. Y.

LEROY G. EDWARDS,
SAUL HAMMER,
of Counsel.

INDEX

Subject Index

PAGE

Statement of Case 1

Reasons for Denial of Writ—

Point I—The decision below is not in conflict with the holdings of this court in the Sherrer and Coe cases 3

Point II—The rule of the Coe and Sherrer cases does not prohibit an attack upon an invalid foreign decree 5

Conclusion 7

Cases Cited

Coe v. Coe, 334 U. S. 373 3

Curley v. Curley, 144 Fla. 728 2

Davis v. Davis, 305 U. S. 32 4

Phillips v. Phillips, 146 Fla. 311 6

Sherrer v. Sherrer, 334 U. S. 343 ..... 3, 4, 5

State ex rel. Willys v. Chillingworth, 124 Fla. 274 6

Wade v. Wade, 93 Fla. 1004 6

Williams v. State of North Carolina, 325 U. S. 226 4

Statute Cited

Fla. Stat. Ann. §65.02 ..... 2, 6

Supreme Court of the United States

October Term, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

against

ELEANOR MUELBERGER,

Respondent.

RE: ESTATE OF E. BRUCE JOHNSON

RESPONDENT'S OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

Statement of Case

Respondent, the daughter and sole legatee of the decedent, instituted a proceeding in the Surrogate's Court of New York, pursuant to Section 145 A of the Surrogate's Court Act, to secure a determination that petitioner was not the surviving spouse of the decedent, and that the notice of election to take against his last will and testament was invalid and of no effect.

This involved an attack by her upon the validity of a divorce decree granted to Madoline Ham Johnson against the decedent by the Florida court.

Respondent was a stranger to the divorce action and was so regarded by the court below (Record 47, 50).

The attack upon the Florida decree was primarily predicated upon the failure of Madoline Ham Johnson to even quantitatively meet the basic requirements of the Florida statute needed to empower the Florida court to grant a decree of divorce.

The conclusive and uncontradicted evidence adduced by the respondent in her attack upon the validity of the Florida divorce decree in the court of first instance, found and followed by the court below (R. 46), undisputably established that Madoline Ham Johnson had resided in Florida at most only 52 days prior to filing her bill of complaint. This did not fulfill the requirement of Section 65:02 of the Florida Statutes Annotated that "in order to obtain a divorce the complainant must have resided 90 days in the State of Florida before the filing of the bill of complaint." This period has been defined by the Supreme Court of Florida as the 90 days next preceeding the filing of the bill of complaint (*Curley* v. *Curley*, 144 Fla. 728, 731).

It was additionally established by fully documented and corroborated testimony, undisputed by the petitioner, that this inadequate residence had for its sole purpose the securing of a divorce against decedent, and that the claim made by Madoline Ham Johnson, in her bill of complaint, that for two years next prior to its filing she had been a resident of Florida, was false and untrue. It was established in the court of first instance and found and followed by the court below, that during this claimed two year period, Madoline Ham Johnson resided in the State of

New York except for a period of three months in the winter of 1941-42, when she went to Florida for a brief period and that during this brief sojourn she instituted a divorce action which was withdrawn by her in February of 1942, and within a week thereafter she returned "home", to use her own word, to the decedent, who resided in the State of New York (R. 46).

Under these circumstances the court below properly refused to grant faith and credit to the Florida decree. In doing so, its conclusions were not, as petitioner claims, violative of this court's holdings in the cases of *Sherrer* v. *Sherrer*, 334 U. S. 343 and *Coe* v. *Coe*, 334 U. S. 373, nor would a review of this cause present to this court a new or novel question not already decided by this court.

POINT ONE

The decision below is not in conflict with the holdings of this court in the *Sherrer* and *Coe* cases.

The claim of the petitioner, that the decision made by the court below in the case at bar is violative of the principles of law laid down by this court in the *Coe* and *Sherrer* cases, cannot be supported for these cases are not determinative of the issues presented here and are not in point on the essentially basic factor presented by the instant case. The *Coe* and *Sherrer* cases involved subsequent attacks by spouses who were not only parties to the divorce action, but had appeared therein, filed answers placing in issue the matters later sought to be attacked, personally appeared at the trial and had actively participated in the proceedings which resulted in adjudications on the merits.

In point of fact, in the *Coe* case, the person attacking the decree of divorce was the party in whose favor the decree of divorce had been granted upon the cross-complaint filed in her answer.

In deciding these cases, this court regarded as determinative the factor that the foreign decree was being subjected to attack by the parties to the original proceedings, stating at page 349 of its opinion in the *Sherrer* case:

> "The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented in this case may consistent with the requirements of full faith and credit be subjected to collateral attack in the Courts of a sister State *in a suit brought by the defendant in the original proceeding.*" (Italics added)

In arriving at its conclusions, this court enunciated and established no new principle of law nor modified any existing rule, but followed the principle declared by it in the case of *Davis* v. *Davis* (305 U. S. 32), that a party to a divorce action who had appeared and unsuccessfully raised the issues of domicil and jurisdiction was held bound by the adjudication and barred from its subsequent re-litigation in a collateral attack upon the decree in a sister state.

Inasmuch as here the attack upon the decree was made by a stranger to the divorce action and not by a party to it, the rule laid down by this court in the case of *Williams* v. *State of North Carolina*, 325 U. S. 226, is properly applicable. Nothing said by this court in its opinions in the *Coe* and *Sherrer* cases changes the position expressed by it at page 230 of the second *Williams* case that "it is one thing to reopen an issue that had been settled after appropriate

opportunity to present their contentions had been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. [Citing cases] But those not parties to a litigation ought not to be foreclosed by the interested actions of others • • •."

POINT TWO

The rule of the *Coe* and *Sherrer* cases does not prohibit an attack upon an invalid foreign decree.

In both the *Coe* and *Sherrer* cases this court basically accepted the finality and validity of the attacked decree by the parties, stating at page 348 of the *Sherrer* case:

> "It should also be observed that there has been no suggestion that under the Law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subjected to the type of attack permitted by the Massachusetts Courts. *The implicit assumption underlying the position taken by the respondent and the Massachusetts Court is that this case involves a decree of divorce valid and final in the state which rendered it; and we so assume.*" (Italics added)

The instant case is to be factually distinguished from the *Sherrer* and *Coe* cases in that it did not present an instance in which a person, conceding the judgment to be valid, sought to find shelter and assistance, by invoking the public policy of a sister state, to there avoid the effect of the judgment.

Here, respondent has always contended that the Florida decree was void. By its statutes (Florida Statutes Annotated, Section 65:02) there must be a residence of 90 days in Florida next preceding the filing of a bill of complaint "in order to obtain a divorce." Under decisions of the courts of Florida the matter of residence is deemed jurisdictional (*Phillips* v. *Phillips*, 146 Fla. 311, 325) and any lack in this regard cannot be obviated by admission of the parties. In the case of *Wade* v. *Wade* (93 Fla. 1004, 1006-1007) the court said that "this is not an instance in which facts going to the jurisdiction may be effectually admitted by the parties."

Under circumstances parallel to the instant case, the Supreme Court of Florida, in the case of *State ex rel. Willys* v. *Chillingworth*, 124 Fla. 274, 278-279, permitted an attack to be made by the daughter and sole heir-at-law of her deceased father, upon a decree of divorce obtained by his widow against her former spouse.

As the court below stated, to require the State of New York to give faith and credit to the Florida decree under these circumstances would be to grant to the Florida decree a more conclusive effect in the State of New York than it had in the state which rendered it.

CONCLUSION

Respondent respectfully prays that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LOUIS FLATO,
Attorney for Respondent,
11 East 44th Street,
New York City, N. Y.

LEROY G. EDWARDS,
SAUL HAMMER,
of Counsel.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 30 1950

Supreme Court of the United States

October Term, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LOUIS FLATO,
Attorney for Respondent,
11 East 44th Street,
New York City, N. Y.

LEROY G. EDWARDS,
SAUL HAMMER,
of Counsel.

INDEX

Subject Index

	PAGE
Statement of Jurisdiction	1
Opinions Below	1
Statement of Facts	2
Summary of Argument	6
Arguments in Support of Affirmance of Decision of Court Below—	
Point I—The Court of Appeals of the State of New York was not required to grant full faith and credit to the Florida Decree of Divorce	7
Point II—The right of respondent to challenge the validity of the Florida decree of divorce was not impaired by the decisions of this court in the cases of *Coe* v. *Coe* and *Sherrer* v. *Sherrer*	10
Point III—The Decree of Divorce against decedent was invalid in Florida and subject to attack there by respondent	15
Conclusion	26

Cases Cited

Bornes v. Miller, 61 So. 828 23

Chisholm v. Chisholm, 125 So. 694 ..... 17, 18

Coe v. Coe, 334 U. S. 378 ..... 6, 10, 11, 12, 13, 14, 15, 18

Curley v. Curley, 198 So. 584 16

PAGE

Davis v. Davis, 305 U. S. 32 ..... 12, 14
De Marigny v. De Marigny, 43 So. (2d) 442 ..... 6, 20, 21, 22, 23
Gaylord v. Gaylord, 45 So. (2d) 502 ..... 7, 20, 23
Hall v. Hall, 112 So. 622 23
Lindgrens Estate, In re, 293 N. Y. 18 ..... 7, 24
Masselotti v. Masselotti, 29 So. (2d) 873 23
Phillips v. Phillips, 1 So. (2d) 186 17
Senor v. Senor, 272 App. Div. 306, affd. 297 N. Y. 809 ..... 8, 21
Sherrer v. Sherrer, 334 U. S. 343 .. 6, 10, 11, 12, 13, 14, 15, 18
Stoll v. Gottlieb, 305 U. S. 165 ..... 12, 14
Urquhart v. Urquhart, 272 App. Div. 60, affd. 297 N. Y. 689 8
Wade v. Wade, 113 So. 374 17
Watson v. Watson, 174 S. E. 33, 172 S. C. 362 23
Williams v. State of North Carolina, 325 U. S. 226 ..... 6, 9, 13, 14, 21
Willys v. Chillingsworth, State ex rel., 168 So. 249 ..... 19, 23

STATUTES CITED

28 U. S. C.,
Section 1257 (3) 1

Decedent's Estate Law of New York,
Section 18 ..... 2, 24

New York Surrogate's Court Act,
Section 145a 24

Florida Statutes Annotated,
Section 65:02 16

Supreme Court of the United States

October Term, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1257 (3). The Court below rendered its judgment on April 14, 1950 (R. 51). The time to file the petition for a Writ of Certiorari was extended to September 9, 1950 (R. 53) by an order of this Court made by Mr. Justice Burton on July 7, 1950. The order granting the Writ of Certiorari was entered November 6, 1950.

OPINIONS BELOW

The unreported opinion of the Surrogate's Court is to be found at page 39 of the record. The Appellate Division of the Supreme Court of the State of New York rendered a memorandum opinion reported in 275 App. Div. 848, and is to be found in the record at page 44. The opinion of the Court of Appeals is reported in 301 N. Y. 13, and appears in the record at page 45.

STATEMENT OF FACTS

The petitioner, Genevieve Johnson, pursuant to Section 18 of the Decedent's Estate Law of the State of New York, filed a notice of election to take against the last will of decedent (R. 4) upon the claim that she was the widow of decedent by virtue of a marriage to him in 1944 (R. 23), after the alleged divorce, which is the subject of respondent's attack in this proceeding, was procured against decedent by his former spouse, Madoline Johnson in Florida on August 17, 1942.

The evidence adduced by respondent in the Surrogate's Court established that decedent's prior wife was present in Florida, at most, 52 day prior to filing her Bill of Complaint in the Florida Court; that she and decedent were at all times domiciliaries of New York; that her sole purpose in going to Florida was to secure a divorce against decedent; that she procured the decree of divorce against decedent by false and perjured testimony and the perpetration of a fraud upon the Florida Court. This evidence was fully corroborated and documented and remained entirely uncontradicted and unimpeached by the petitioner.

The leading facts establishing these conclusions are succinctly summarized as follows and are to be found in the Record at the indicated pages:

Madoline Johnson (nee Ham) married the decedent in San Francisco, California, on April 15, 1939 (Pet. Exhs. 1 and 2 of 1/12/48), and came to New York with decedent to live in December, 1939 (R. 27).

Thereafter, she resided in New York with decedent at Austin Place, Kew Gardens, New York (R. 28); at Cambridge Avenue, Garden City, New York (R. 28) and at 12

Fifth Place, Garden City, New York (R. 28, 29), until before Thanksgiving of 1941 (R. 36).

In February, 1942, she returned to the decedent (Pet. Exhs. 4 and 5 of 5/12/48) and was residing with decedent at 12 Fifth Place, Garden City, New York (R. 14, 31 and 36).

During the month of April, 1942, she left the decedent and went to live at 9 North Poplar Street, West Hempstead, New York (R. 14, 15).

On April 13, 1942, Madoline Johnson filed with the Garden City, New York Post Office, a change of her address from 12 Fifth Place, Garden City to 9 North Poplar Street, West Hempstead (R. 13), and resided at 9 North Poplar Street until on or about June 7th, 1942, when she left New York for Pensacola, Florida where she occupied a cabin (R. 15, 16, 21).

On July 29, 1942, she filed a Bill of Complaint against the decedent for an absolute divorce in the Court of Record, of Escambia County, Florida, in which a final decree of divorce was entered against the decedent on August 17, 1942 (Pet. Exh. 3 of 1/12/48).

This is the decree attacked by respondent, in the proceeding below.

At all of these times, the decedent was not a resident of the State of Florida, but was a resident of the State of New York (Paragraph 2, Page 1 of Pet. Exh. 3 of 1/12/48, Resp. Exh. A of 5/12/48).[1]

[1] For the purpose of accuracy, it should be noted at this point, that although decedent, through attorneys filed an answer denying the allegations of misconduct, the record does not indicate the attendance of decedent at the hearing or any participation by him therein

Even assuming that she arrived at Pensacola on the day she left New York, June 7, 1942, only 52 days elapsed until July 29, 1942, when she filed her Bill of Complaint for divorce.

The testimony in the court of first instance further conclusively established that Madoline Johnson procured the decree of divorce by false and perjured testimony and the perpetration of a fraud upon the Florida Court.

In her bill of complaint for divorce, Madoline Johnson alleged that for two years next prior to her filing her bill of complaint on July 29, 1942, she resided in Pensacola, Florida (Pet. Exh. 3 of 1/12/48).

Within this claimed two year period, the evidence adduced below is uncontradicted and unimpeached that Madoline Johnson:

In July of 1940, with decedent, was residing at 59 Cambridge Avenue, Garden City, New York (R. 28, 29, 34, 35), under the terms of a written lease, executed both by her and decedent (Pet. Exh. 1 of 5/12/48);

In March of 1941, together with decedent, moved their residence from 59 Cambridge Avenue to 12 Fifth Place, Garden City, Long Island, New York (R. 29, Pet. Exh. 2 of 5/12/48);

From March of 1941 to just before Thanksgiving of 1941, resided with decedent at 12 Fifth Place, Garden City, New York, when she left the decedent (R. 30, 36);

In February of 1942, returned to her home at 12 Fifth Place (R. 31, 36, Pet. Exhs. 4 and 5 of 5/12/48), where she

continued to reside until April of 1942, when she moved to 9 North Poplar Street, West Hempstead, New York (R. 13, 14-15, 31), and resided at 9 North Poplar Street until within a day or two after June 5, 1942, went to Florida (R. 15-17, 21), solely for the purpose of obtaining a divorce (R. 69, Pet. Exh. 3 of 5/12/48) and returned to 9 North Poplar Street, West Hempstead, shortly after securing the Florida decree (R. 17);

Went to Elkton, Maryland, within a few days after her return from Florida and there on August 30, 1942, obtained a marriage license, registering 9 North Poplar Street, West Hempstead, Long Island, as her residence (Pet. Exh. 4 of 1/12/48);

On August 30, 1942, married the witness, Burroughs (Pet. Exh. 4 of 1/12/48) and returned to 9 North Poplar Street, West Hempstead, New York where for two years she continued to live with the witness Burroughs (R. 18);

Maintained her bank account, opened in June of 1940 at the Garden City Trust Company, Garden City, Long Island, New York, and used it to pay the fees of her Florida attorneys (Pet. Exh. 6 of 5/12/48);

Maintained without change or correction her New York State Motor Vehicle Operator's License, issued in January, 1940, in which she gave her legal residence as 8267 Austin Street, Kew Gardens, Long Island, New York (Pet. Exh. 6 of 5/12/48), until its renewal in June 1943, when she noted a change in her name to Burroughs and a change of legal residence to 9 North Poplar Street, West Hempstead, New York (Pet. Exh. 7 of 5/12/48).

SUMMARY OF ARGUMENT

Inasmuch as the attack upon the decree was made by one not a party to the divorce action, the Court below, exercising the policy of the State of New York, properly entertained an inquiry into the jurisdiction of the Florida Court to render a decree affecting parties who were residents of the State of New York.

It being conclusively established that complainant had resided in Florida less than the 90 day period required to confer jurisdiction upon the Florida Court, the Court below was justified in refusing to grant the Florida decree full faith and credit.

The right of the Court of Appeals to inquire into the jurisdiction of the Florida Court and to refuse it full faith and credit is permitted under the ruling of this court in the case of *Williams* v. *State of North Carolina, infra.*

Petitioner's claim that the decision of the Court below is violative of the principle of law laid down by this Court in the cases of *Coe* v. *Coe* and *Sherrer* v. *Sherrer, infra,* cannot be supported for these cases are not in point on the essentially basic factor presented by the case at bar, since these cases involve subsequent attacks by spouses who were not only parties to the divorce action, but had appeared therein and actively participated in the trials thereof which resulted in adjudications on the merits. This Court, in the *Coe* and *Sherrer* cases, made it clear that it did not intend, by its decisions, to prevent an attack upon a foreign decree of divorce if such decree was invalid or could be subjected to collateral attack in the State where rendered.

The adoption, by the State of Florida, in the decisions of its Supreme Court in the cases of *De Marigny* v. *De*

Marigny and *Gaylord* v. *Gaylord, infra,* of a policy restricting attacks by third parties, cannot limit the constitutional perogatives of the State of New York with respect to the marital status of its citizens. To permit a limitation by the decretal State to foreclose inquiry by sister states into an unfounded assumption of jurisdiction would be to impose upon all states the acceptance of invalid divorces and result in destroying the necessary prerequisite of jurisdiction to granting full faith and credit to foreign decrees.

POINT I

The Court of Appeals of the State of New York was not required to grant full faith and credit to the Florida Decree of Divorce.

The Court of Appeals of the State of New York, in furtherance of the State's interest in the matrimonial status of its citizens and the rights, property interests and responsibilities that flow therefrom, established the rule that third parties might challenge, for lack of jurisdiction, the right of a foreign court to decree a termination of that status in the case of *In re Lindgren's Estate,* 293 N. Y. 18.

In that case the wife of the decedent, divorced by him in an action in Florida in which she had appeared; in her capacity as guardian *ad litem* of an infant child of her marriage to decedent, sought letters of administration of his estate and contested the right to such letters by the wife of the decedent by a subsequent marriage, upon the claim that the decree of divorce obtained by the decedent against her in Florida was void for lack of jurisdiction, the decedent never having acquired a bona fide residence in Florida.

Although acting through her mother, who had been a party to the Florida action, the attack upon the decree, in actual effect, was made by the daughter and sole distributee of the decedent.

In holding that the petitioner, a third party to the decree of divorce had a right to attack the validity of the Florida decree, the Court below stated at page 23:

> "The divorce action brought by the decedent in 1939 and the subsequent appearance therein by the petitioner did not suffice to confer upon the Florida Court jurisdiction of the subject matter of the action. It has been established in the present proceeding that neither party to that action was a domiciliary of Florida before the complaint was filed. It is that lack of domicile which deprived the foreign court of jurisdiction. In those circumstances the courts of this State did not violate the full faith and credit clause of the Federal Constitution when in this proceeding they refused to give effect to the Florida divorce decree of 1939."

This rule was twice reiterated by the Court below by its affirmance without opinion of the decisions of the Appellate Division of the Supreme Court of the State of New York, First Department, in the cases of *Urquhart* v. *Urquhart,* 272 App. Div. 60, affirmed in 297 N. Y. 689 and *Senor* v. *Senor,* 272 App. Div. 306, affirmed in 297 N. Y. 809.

In the *Urquhart* v. *Urquhart* case, the Appellate Division, in its opinion stated at page 63:

> "Matter of Lindgren (293 N. Y. 18) requires an affirmance of the order denying the motion to dismiss the complaint. The decision therein does not appear to have turned on the belated appearance of the defendant in the Florida action, but rather upon the

> circumstances that the child of the marriage had not been a party to the divorce action, notwithstanding the contention that neither of the 'two parties could thereafter challenge the validity of the foreign court's decree' (p. 22, citing Krause v. Krause, supra, decided under the quasi-estoppel doctrine)."

To similar effect the Appellate Division held in the case of *Senor* v. *Senor,* at page 311:

> "Where persons having no complicity in the divorce proceedings have legitimate interests in a determination of the validity of the divorce, they may arouse the State's interest and institute an inquiry, which our courts will entertain to ascertain the validity of a divorce decreed by a foreign state as to persons alleged to have been at the time residents of this State. Matter of Lindgren, 293 N. Y. 18, supra; Urquhart v. Urquhart, 272 App. Div. 60)."

The court goes on to say at page 313:

> "That authority is amply affirmed and vindicated by the rule that third parties may at all times challenge the decree. (Matter of Lindgren, 293 N. Y. 18, supra; Urquhart v. Urquhart, supra). The infirmity in the decree remains constant and its vulnerability to the attack of third parties is sufficient protection of society's interest. It is not necessary to go further and hold that the parties themselves may impeach the decree whenever it suits their purpose."

The same rule was established by this Court in the case of *Williams* v. *The State of North Carolina,* 325 U. S. 226, wherein it said at page 230:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions have been afforded to all who had an interest in its adjudication. This applies also to

jurisdictional questions. After a contest these cannot be relitigated as between the parties. Forsyth v. Hammond, 166 U. S. 506, 517; Chicago L. Ins. Co. v. Cherry, 224 U. S. 25, 30; Davis v. Davis, supra. But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."

The Court below was, therefore, justified in refusing to grant full faith and credit to the Florida decree of divorce by sustaining respondent's challenge to its validity.

POINT II

The right of respondent to challenge the validity of the Florida Decree of Divorce was not impaired by the decisions of this court in the cases of *Coe* v. *Coe* and *Sherrer* v. *Sherrer*.

The right of the Court below to inquire, at the instance of one not a party to the action, into the jurisdiction of the Florida Court to grant a decree of divorce affecting domicillaries of the State of New York remained unaffected by the decisions of this court in the cases of *Coe* v. *Coe*, 334 U. S. 378, and *Sherrer* v. *Sherrer*, 334 U. S. 343, and its decision sustaining Respondent's challenge was not, as petitioner claims in her brief, violative of the rulings in the *Sherrer* and *Coe* cases, *supra*.

The *Coe* and *Sherrer* cases, it is respectfully submitted, are not determinative of the issues presented in the instant

case, and are not in point in the essentially basic factor presented by the case at bar.

Both of these cases involved subsequent attacks by spouses, who were not only parties to the divorce action, but had appeared in the action, filed answers, personally appeared at the trial and had actively participated in the proceedings which resulted in adjudications on the merits.

In the *Sherrer* case, the defendant's husband entered a general appearance and subsequently, through an attorney, filed an answer in which he alleged that the plaintiff was not a bona fide resident of the State of Florida. In addition, he appeared and testified at the trial of the divorce proceedings. In this connection this court stated at page 352, of its opinion:

> "Respondent participated in the Florida proceeding by entering a general appearance, filing pleadings, placing at issue the very matters he sought subsequently to contest in the Massachusetts Courts, personally appearing before the Florida Court and giving testimony in the case."

In the *Coe* case, the attack on the Nevada decree in the Massachusetts Court was made by a wife who had been the defendant in the Nevada action for divorce. She had appeared in the action, filed an answer and in her answer filed a cross-complaint for divorce. She, as well as her husband, the plaintiff in the Nevada divorce action, appeared and testified upon the trial and after trial and she, as defendant, was granted a decree of divorce upon her cross-complaint.

On this score this court, pointed out at page 384:

> "It is abundantly clear that respondent participated in the Nevada divorce proceeding. She ap-

peared personally and gave testimony at the hearing. Through her attorneys, she filed pleadings in answer to petitioner's complaint and successfully invoked the jurisdiction of the Nevada Court to obtain the decree of divorce which she subsequently subjected to attack as invalid in the Massachusetts Courts."

It would appear that this court in these cases regarded as determinative the factor that the foreign decree was being subjected to attack by the party to the original proceedings, and so stated at page 349:

> "The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented in this case may consistent with the requirements of full faith and credit be subjected to collateral attack in the Courts of a sister State *in a suit brought by the defendant in the original proceedings.*" (Italics ours.)

It similarly stated in its opinion in the *Coe* case:

> "In the Sherrer case we concluded that the requirements of full faith and credit preclude the courts of a sister state from subjecting such a decree to collateral attack by readjudicating the existence of jurisdictional facts. *That principle is no less applicable where, as here, the party initiating the collateral attack is the party in whose favor the decree was entered.*" (Italics ours.)

In arriving at its conclusion in these cases, this Court enunciated and established no new principle of law, or modified any existing rule but followed squarely its previous decisions in the cases of *Stoll* v. *Gottlieb*, 305 U. S. 165, and *Davis* v. *Davis*, 305 U. S. 32, holding that the parties to a divorce action who had appeared and unsuccessfully

raised the issues of domicile and jurisdiction were held bound by the adjudication against them and barred from a subsequent re-litigation in a collateral attack upon the decree in a sister state.

It would appear that this Court's decisions in the *Coe* and *Sherrer* cases, *supra,* were intended by it neither as an extension of the rule laid down in the *Stoll* v. *Gottlieb* and *Davis* v. *Davis* cases, *supra,* nor to impose an additional limitation of the fundamental principles reiterated by it in the case of *Williams* v. *The State of North Carolina, supra.*

It so stated at page 351 of the *Sherrer* case:

> "We believe that the decision of this Court in the Davis case and those in related situations, are clearly indicative of the result to be reached here. These cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the Courts of a sister state where there has been participation by the defendant in the divorce proceeding, where defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the Courts of the State which rendered the decree."

Nothing said by this Court, in its opinion in the *Coe* and *Sherrer* cases, changes the position taken by it in the *Williams* v. *State of North Carolina* case, *supra,* wherein it said at page 229:

> "A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits—had jurisdiction, that is to render judgment.

> "It is now too late to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction • • • It was 'too late' more than forty years ago. German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 128."

After enunciating the new principle that one spouse could establish a domicile apart from the other, this court, in the second *Williams* case, reiterated the long established fundamental principle that the state of domicilliary origin had the right to inquire into the jurisdictional authority of a foreign state to grant a decree of divorce, and refuse to grant it faith and credit for lack of domicile. In doing so it would seem that this court made it clear that it intended no extension or relaxation of the rule laid down by it in the *Davis* v. *Davis* and *Stoll* v. *Gottlieb* cases, *supra,* that one who had actively participated in a divorce proceeding, after having been afforded full opportunity to contest the issue of jurisdiction, would be barred from a collateral attack upon the resulting decree. This, it made clear in a footnote at page 230 of its opinion in the *Williams* case stating that:

> "We have not here a situation where a state disregards the adjudication of another state on the issue of domicile squarely litigated in a truly adversary proceeding."

The decision of the Court below quite properly followed the rule of the second *Williams* case and was in no way violative of this Court's decisions in the *Coe* and *Sherrer* cases.

POINT III

The Decree of Divorce against decedent was invalid in Florida and subject to attack there by respondent.

This Court appears to have made it evident that the rule laid down in the *Coe* and *Sherrer* cases, *supra*, were not intended, despite the participation of the parties, to prevent an attack upon a foreign decree of divorce if such decree was invalid in the State where rendered or could there be subjected to collateral attack.

This Court so stated at page 348 of the *Sherrer* case, *supra*:

> "It should also be observed that there has been no suggestion that under the Law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subjected to the type of attack permitted by the Massachusetts Courts. The *implicit assumption underlying the position taken by the respondent and the Massachusetts Court is that this case involves a decree of divorce valid and final in the State which rendered it; and we so assume.*" (Italics added.)

To similar effect is the opinion in the *Coe* case, *supra*, at page 383:

> "It is clear that the decree of divorce in question is valid and final in the State in which it is rendered and under the laws of Nevada may not be subjected to the collateral attack permitted in this case in the Massachusetts Courts. *Respondent does not urge the contrary.*" (Italics added.)

The attack against the Florida decree was predicated upon the failure of decedent's spouse to even quantitatively

meet the basic requirement of the Florida statutes to confer jurisdiction in an action for divorce.

The conclusive and uncontradicted evidence adduced by respondent in the Court of first instance, found and followed by the Court below (R. 46) patently and obviously disclosed the invalidity of the Florida decree.

It was established that she had resided in Florida, only 52 days prior to filing her bill of complaint. As was similarly proven, this limited residence had for its sole purpose the securing of a divorce against the decedent, and, therefore, had not the bona fide character required to constitute domicile in Florida. However, even if it had, the length of her residence was insufficient to confer jurisdiction and enable her to secure a divorce.

Section 65:02 of the Florida Statutes Annotated requires that:

> "In order to obtain a divorce, the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint."

The Supreme Court of Florida has defined this period as being the ninety days next preceding the filing of the bill of complaint.

It so held in the case of *Curley* v. *Curley*, 198 So. 584, at page 586:

> "Therefore it is our conclusion that the burden of proof in this case was on the plaintiff's wife to show that she had resided in Florida for a period of ninety days next prior to the date of filing the suit for divorce and at the time of taking up her residence in Florida, she had the capacity to acquire a separate domicile of her own in the State of Florida."

To similar effect is the holding of the Florida Supreme Court in the case of *Chisholm* v. *Chisholm*, 125 So. 694, at page 701:

> "It may not be essential to the granting of a divorce that the bill of complaint should do more than allege the 'residence' of complainant substantially in the language of the statute, but the evidence to sustain it must show that complainant has 'resided' bona fide in this state for the two years next preceding the date of filing the bill of complaint."[1]

The failure to acquire the necessary 90 days residence is jurisdictional under the Florida Law.

This was held by the Florida Supreme Court in the case of *Phillips* v. *Phillips*, 1 So. (2nd) 186, at page 190:

> "The matter of residence for the statutory period is jurisdictional and jurisdiction cannot be acquired or exercised by or pursuant to agreement between the parties. Jurisdiction cannot be assumed on decree pro confesso."

Submission by the parties to the court on admission of residence in their pleadings is insufficient to establish the Court's jurisdiction.

This was held by the Florida Supreme Court in the case of *Wade* v. *Wade*, 113 So. 374, at page 375:

> "Such residence being jurisdictional, an admission thereof by the parties in their pleadings is ineffectual as a substitute for proof. The requisite

[1] The *Chisholm* case was decided prior to the amendment of the Florida statute reducing the period of residence from two years to ninety days, being in every other respect, identical with the present section, quoted above.

> residence must be alleged in the bill and established by the proof. This is not an instance in which facts going to the jurisdiction may be admitted by the parties."

In the case of *Chisholm* v. *Chisholm, supra,* the Florida Supreme Court, similarly held at page 704:

> "It would seem that the Court had no jurisdiction of the action by virtue of lack of domicil. More than a year later defendant attacked the decree. The concurring opinion felt that the defendant had failed to use diligence and that defendant should not now be heard to question the sufficiency of evidence in support of grounds for divorce."

The opinion goes on to state:

> "The jurisdictional infirmity because of complainant's residence in Florida, however, is fatal to the decree notwithstanding the defendant's inattention to the suit. Because of the showing made in that behalf, I concur in the order of reversal."

Madoline Johnson having failed to acquire the requisite residence of 90 days prior to filing her bill of complaint, the Florida Court never acquired jurisdiction to render its decree, and the decree granted is, therefore, void. Lacking the necessary domiciliary requirement and having obtained the decree by false and perjured evidence and the perpetration of a fraud upon the Florida Court, the decree is invalid.

The case at bar is to be further distinguished from the effect of the ruling in the *Coe* and *Sherrer* cases, *supra,* in that under the Florida law, the decree here was subject to attack in the courts of Florida.

In the case of *State ex rel., Willys* v. *Chillingsworth*, 168 So. 249, Virginia Willys de Landa filed a bill of complaint in the Circuit Court of Palm Beach alleging that she was the only daughter and heir-at-law of John N. Willys, decedent and that Florence K. Willys claimed to be the widow of decedent and entitled to rights and interests in his estate. Her bill of complaint also charged that Florence K. Willys was in fact not decedent's widow, because she was the lawful wife of one, Harold J. Dolan, when she married decedent, since a divorce she attempted to obtain from Dolan in the Circuit Court of Dade County was fraudulently obtained. It was further alleged in her bill of complaint that decedent had left the major portion of his estate to Florence K. Willys and but a small portion to her and that she had filed objections to the probate of the will, and prayed that Florence K. Willys, accordingly, be decreed to have no interest in the estate of decedent.

Florence K. Willys instituted a prohibition proceeding challenging the jurisdiction of the court to adjudicate the questions raised in the bill of complaint of Virginia Willys de Landa upon the ground, among other things, that as sole heir-at-law and daughter of the decedent she was not entitled to have jurisdictionally determined and fixed the relative rights of herself and the alleged widow of decedent.

In upholding her right to thus attack the decree of divorce, the court stated at page 257:

> "The rule is settled in this state that respondent, being heir to her father's estate, has a right to question the validity of his marriage to petitioner. Rawlins v. Rawlins and Kushmsted v. Trunwall, supra.
>
> The validity of the marriage of John N. Willys to Florence E. Dolan Willys is determined by the valid-

ity of the divorce decree in Dolan v. Dolan which was entered in Dade County, October 25, 1933. The bill challenging the validity of the decree in Dolan v. Dolan was filed February 7, 1936, in Palm Beach County, less than 3 years after said decree was entered. The Circuit Courts of Dade and Palm Beach Counties are courts of co-ordinate jurisdiction and the decree in Dolan v. Dolan appears to be the real gravamen of the litigation.

The cases relied upon by respondent support her contention, but they differ in material respects from this case. In view of the fact that the final decree in Dolan v. Dolan was not appealed from, that courts of chancery have inherent power to correct their decrees, that it was predicated on intrinsic fraud, and is the real gravamen in the litigation, this court has reached the conclusion that the orderly administration of justice would be best served by giving the Circuit Court of Dade County the opportunity to correct its decree if it was fraudulently obtained. Byrant v. Byrant, 101 Fla. 177, 133 So. 635, Cone v. Cone, 112 Fla. 793, 136 So. 466, Miller v. Griffin, 99 Fla. 976, 128 So. 416."

In Point II of her brief, petitioner urges that the court below erred in concluding that the State of Florida permitted a collateral attack by a stranger to a divorce decree and overlooked the recent decisions on this point rendered by the Florida Supreme Court in the cases of *De Marigny* v. *DeMarigny*, 43 So. (2d) 442, and *Gaylord* v. *Gaylord*, 45 So. (2d) 507.

It is to be noted that when the instant case was taken to the New York Court of Appeals, these cases had not yet been decided by the Florida Supreme Court and that the

attention of the court below had not been directed to these cases by the petitioner in the points made in the brief submitted by her to that Court.

It is, however, respectfully submitted that consideration of these cases could not have affected the conclusion of the court below. The constitutional right of the State of New York to regulate the domestic affairs of its citizens could no more be impaired by a policy adopted by the State of Florida to restrict and limit attacks upon its court's jurisdiction, than it could by an easy and unfounded assumption of jurisdiction by the Florida Court in the first instance.

The fact that the Florida Court may have, in its decree, recorded a finding of its jurisdiction cannot, as this court stated in the second *Williams* case, *supra*, "foreclose examination by another State. Otherwise as we pointed out long ago, a Court's record would establish its power and the power would be proved by the record." Analogously, the policy of the State of New York, adopted in the exercise of its constitutional authority over the marital affairs of its residents, may not be impaired or limited by the policy by a foreign state designed to restrict or eliminate, in its courts, attacks upon its invalid decrees, adopted in furtherance of a desire to enhance, if possible, the attractiveness of its "easy divorces".

An analysis of the *De Marigny* case, *supra*, indicates that Florida has adopted a policy with respect to attacks upon divorce decrees by third parties, in direct variance with that prevailing in the State of New York. At page 446 of its opinion, the Florida Supreme Court states its difference from the policy of New York, as expressed in the case of *Senor* v. *Senor*, *supra*, and concludes that it

prefers to leave the parties to a divorce action where it found them, even though to do so would be to sanction a fraudulent decree.

To permit the State of Florida to thus limit attacks upon its decrees by the State of New York, it to permit, ultimately, the elimination of any attack and so effect the imposition of Florida's tourist-minded, pleasure-bent divorces upon all the states of the nation without regard to their own laws and policies on the subject of the marital status and rights of their own citizens.

To urge that the court below could not entertain an attack upon a decree granted by a Florida Court, when the record unequivocably established that complainant's residence in Florida was less than the period required by the Florida statutes to create in its courts the power and authority to act, is to urge that, no residence whatever is required by a complainant if the formality of an appearance is indulged in by a defendant. To accept such a thesis is to conclude that a marriage may be dissolved by consent of the parties without cause or reason, beyond their mutual desire, and such dissolution binding on all persons in all states—a condition which even the accommodating policy of Florida would not appear to countenance.

Respondent desires to point out in any event, that the limitation sought to be imposed against the attack upon a divorce decree by one not a party to the action would not have prevented an attack by this respondent in Florida. It is to be noted that in the *De Marigny* case, the Florida Court found that the divorce decree did not effect the status or right of the attacking party that existed at the time of the entry of the decree. The respondent, as the daughter and

next of kin of decedent, had a status at the time the decree was rendered. As defined by the Florida Supreme Court in the case of *State ex rel., Willys* v. *Chillingsworth, supra,* this status gave her the right to attack the divorce decree even under the ruling in the cases of *De Marigny* v. *De Marigny* and *Gaylord* v. *Gaylord supra.*

It is also to be noted that the Courts of Florida do not in all cases preclude an attack upon a fraudulent decree by a party who has appeared in the action. In the cases of *Barnes* v. *Miller,* 61 So. 828, *Hall* v. *Hall,* 112 So. 622 and *Masselotti* v. *Masselotti,* 29 So. (2d) 873, the Florida Court has permitted attacks upon judgments claimed to have been procured by fraud when the attacking party was not a party to the fraud practiced upon the court.

In the case at bar, the record is barren of any indication that decedent was a party to the fraud perpetrated upon the Florida court by Madoline Johnson or that he in any way had knowledge of the fact that Madoline Johnson had not resided in Florida for a period of 90 days next preceding the filing of her complaint. At no time has petitioner so asserted at any point during the instant case.

In Point I of her brief, petitioner contends that respondent, as heir-at-law of decedent, stands in his shoes, and that she therefore is estopped from making any assertion he could not. In support of this contention, the petitioner cites the case of *Watson* v. *Watson,* decided by the State of South Carolina, 174 S. E. 33, 172 S. C. 362, from which it would appear that there was there involved property rights passing by descent and a widow's right of dower.

This does not here obtain, as appears to have been conceded by the petitioner when she points out later in Point

I of her brief, that respondent's contest of petitioner's right to take against the will flows from her status as sole beneficiary under the will.

Actually, no question of derivative property rights is here involved. The right to dower on a deceased husband's realty no longer exists in the State of New York. Under Section 18 of the Decedent's Estate Law, the State of New York grants to a widow the right to elect to take against the last will of decedent, as in intestacy. This is a personal right, not passing with or attaching to decedent's property and is granted only to one having the status of widow, and does not come into being until the election of the right is exercised. Without the status of widow, the right to elect may not be exercised. Under Section 145a of the Surrogate Court Act of the State of New York, anyone interested may obtain a determination of the right to make such an election, and this would include creditors of the estate as well as legatees.

That there is here involved a question of the exercise of a personal right rather than a derivative property right is attested by the holding of the Court of Appeals of the State of New York in the case of *In re Lindgren Estate, supra* where the court stated at page 22:

> "It is said that when both parents of the child appeared in the Florida court in the manner disclosed by the present record neither of those two parties could thereafter challenge the validity of the foreign court's decree. See Vernon v. Vernon, 288 N. Y. 503, 41 N.E. 2d 792; Krause v. Krause, 282 N. Y. 355, 357, 26 N.E. 2d 290; Restatement of the Law of Judgments, Pps. 19; Restatement of the Law of Conflict of Laws, P. 112. With such parental disa-

bility as a basis for her argument the appellant asserts that the child is in privity of estate with the decedent and thus is burdened with the same disability to challenge the validity of the Florida decree of divorce.

We think that under facts disclosed by this record the law does not visit upon the child the disability thus imposed upon the parents. The rights which are asserted in this proceeding are not property rights to which either parent has claimed to be entitled. There is no claim that the estate will derive special benefit or suffer special disadvantage in the appointement of either of the two present claimants to letters of administration. It may well be that the decedent or his personal representative acting in his behalf could not question the Florida decree. Hynes v. Title Guarantee & Trust Co., 273 N. Y. 612, 7 N.E. 2d 719. In this proceeding however, it is neither a right of the decedent or of his estate which is the subject matter of inquiry. The petitioner attacks the validity of the Florida decree in behalf of the decedent's daughter—not in behalf of the decedent or of his estate or of the petitioner herself. By applying appropriate principles to the facts of record a choice must be made between the right, under Section 118 of the Surrogate's Court Act, of the petitioner, as guardian of the decedent's only child, to administer his estate and the right, under the same statute, of the appellant who claims to be his widow. In each instance we are dealing with matters personal to the claimant; not to the decedent or his estate. As to the child they are independent rights to which she claims to be legally entitled as the sole distributee of her father's estate"

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed in all respects.

Respectfully submitted,

LOUIS FLATO,
Attorney for Respondent,
11 East 44th Street,
New York City, N. Y.

LEROY G. EDWARDS,
SAUL HAMMER,
of Counsel.

(GP—8806)